

LAW

*A Century of Progress*

1835 · 1935

# LAW

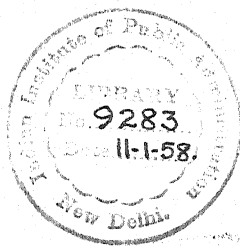
## *A Century of Progress*

1835 · 1935

CONTRIBUTIONS IN  
CELEBRATION OF THE 100TH  
ANNIVERSARY OF THE FOUNDING  
OF THE SCHOOL OF LAW OF  
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VOLUME TWO

*Public Law and Jurisprudence*



# THE CRISIS IN THE THEORY OF THE STATE

HAROLD J. LASKI

## I

NO *Staatslehre* is ever intelligible save in the context of its time. What men think about the state is always the outcome of the experience in which they are immersed. The Massacre of Saint Bartholomew's Day produces Whiggism in the author of the *Vindiciae*; the Puritan Rebellion sets Hobbes searching for the formula of social peace; the "Glorious Revolution" of 1688 enables Locke to affirm that the power of the Crown is built upon the consent of its subjects. Rousseau, Hegel, T. H. Green, all sought to give the mental climate of their time the rank of universal validity. And the more critical the epoch in which we live the more profound is the emphasis upon universality. Men fight grimly for the status of ideologies lest the experience they seek to validate be denied by their opponents.

Our age, in this regard, is no different from its predecessors. It is an age of critical transition in which, as at the end of the fifteenth and the eighteenth centuries, a new social order is grimly struggling to be born. Our scheme of values is in the melting pot, and the principles of its refashioning have not yet been determined. As always in such a time, men have gone back to the foundations of politics; and they seek anew to explain the nature and functions of the state. There is a confusion in the atmosphere of discussion which betokens the advent of a revolutionary age. War—and a peace that it is not easy to distinguish from war—an economic crisis of unparalleled intensity, in Russia the founda-

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tion of a socialist society, in the Far East the birth of a new and aggressive imperialism—these have compelled new approaches to problems that, hardly a generation ago, seemed to men settled beyond dispute. What is in issue now is not the minor matter of the state's form; what is in issue is the nature of the state itself. We cannot, as I conceive it, understand the profundity of the debate unless we realize that it is a crisis that involves the ultimate substance of society's constitution.

There is no avenue of politics into which it does not enter. The limits of state intervention, the validity of the democratic hypothesis, the place of the executive in the scheme of government, the relation of expert to amateur in the processes of administration and legislation, the nature of law in general and of international law in particular, the claims of reason in politics, the function of leadership—all these, to take only some outstanding examples, have been found to require reassessment and redefinition. In all of them, we are only at the beginning of what will unquestionably prove an epoch of decisive importance in the history of political philosophy; and it is too early, as yet, to predict with any confidence what stability will be attained. It took nearly three hundred years for the idea of the liberal state to grow to a mature expression. Its supremacy lasted for less than a century. All that we can now say of our own time is that we are certain the challenge to the liberal doctrine is clearly a decisive one. There is no evidence to indicate with clarity on what side the victory will rest.

Ours, as I say, is an epoch in which the characteristic confusion of a transitional time is the main feature of speculation. The call is loud for a new social philosophy; the prophets are many. I cannot attempt within a brief compass even to set out, much less to estimate, the chaos of competing doctrines. All that this article will seek to do is to state, as plainly as possible, what seems to be

the fundamental issue as it is beginning to emerge; and I shall then attempt to illustrate its character by reference to four essential fields of enquiry. These are: (1) the nature of law; (2) pluralism; (3) the attack on the democratic state; and, finally, (4) the special problems which have arisen with the emergence of an international order in whose fate, for good or ill, we are all involved.

## II

The fundamental issue, at least, is straightforward; what is challenged is the liberal theory of the state. This, as it was fashioned by three centuries of discussion, assumed that in every political society where anarchy was to be avoided there must be a supreme authority which gives orders to all and receives orders from none. This authority was the sovereign power, and it was exercised in the name of the state by the government to whom its operation was entrusted. The justification of this power was variously conceived. Broadly, we may say, as a liberal democracy based upon universal suffrage became, before the war, the main objective of Western civilization, it was argued that the title of the state to obedience lay in its performance of three functions: (1) it secured order; (2) it provided a technique of peaceful change; and (3) it enabled demand to be satisfied on the widest possible scale.

There was, of course, dissent from this view, both in detail and in principle. But, predominantly, this was the view that commanded assent. This, also, is the view that has been fundamentally attacked in the last twenty years, and so widely that its title to predominance may now be regarded as doubtful. The main ground for the attack does not lie in a denial that the state power secures order: this is universally admitted. What is argued is that



what the order maintained by the state secures does not provide a technique of peaceful change and does not permit demand to be satisfied on the largest possible scale.

The state, it is urged, is, in fact, the supreme coercive power in any given political society; but it is, in fact, used to protect and promote in that society the interest of those who own its instruments of production. The state expresses a will to maintain a given system of class relations. It does so by the use of its supreme coercive power to that end. In the last analysis, this power consists of the defense forces of the state. These are used, in ultimate challenge, to impose the will of the owners of the instruments of production upon those excluded from such ownership. Whatever the philosophic purposes attributed to the state power, these, it is said, are the naked facts. There may be more or less coercion at any given moment, according as the economic condition of society enables more or less concessions of material well-being to be made to those excluded from the privileges of ownership. But any state in which the instruments of production are privately owned cannot, by its inherent nature, achieve either the second or the third of the objectives listed above. It does not provide a technique of peaceful change, for men who have the privileges of ownership seek to maintain them, the more vehemently as they contract. These men are certain to be resisted by those excluded from these privileges as they find their expectation of increasing material welfare defeated. The only way open to the latter if they wish to avoid this disappointment is to capture the state power in order to use it for a redefinition of class relations. Theoretically, no doubt, this can be done peaceably in a constitutional system based on universal suffrage. In fact, historically, whenever an attempt at such redefinition has been made, it has always been resisted by the owners of property who, thereby, have been possessed of the state power. The result of the incompatibility of the

views on the use to which the state power should be put is revolution. This, in its nature, is essentially a battle for the maintenance or change of the objectives to which the state power is devoted. The battle is inescapable (whatever its result) so long as the state power is used to confirm a body of legal postulates that stereotype any given system of class relations in a condition where their economic and psychological results are regarded as unjust by those who do not conceive themselves to profit from the privileges it maintains.

The state, further, cannot in this context achieve its end of satisfying demand on the largest possible scale, for the demand satisfied in terms of its legal postulates is effective demand, and the nature of this depends upon the system of property in the given society. Where, as in the capitalistic state, the essential incentive to production is the making of profit, it follows that in the process of distribution there will not be either (a) an equal claim upon what there is of common welfare or (b) such a rational justification of differences in reward as will relate them to a good in which the welfare of those discriminated against is involved; in a word, in such a society the distributive process has no inherent connection with the ends of justice. But this is to say that in such a society the coercive power of the state is used to promote differences in relation to the satisfaction of demand, which may be (and in fact often are) unjust. Only the capture of the state, followed by the redefinition of its legal postulates, could remedy this condition.

This, as I understand it, is the challenge issued to the classic theories of the state in recent years. In its general outline, it was first formulated by Marx and Engels; and it received its classic restatement by Lenin in his book, *The State and Revolution*. I am not aware of any adequate answer to it from opponents of the challenge. The idealist theory of the state, as, for example, in its

famous formulation by Bosanquet, remains a formulation of a conceptual state *in posse* rather than of the states we know. The liberal and anti-idealist view, as expressed by L. T. Hobhouse, assumes but does not prove that, given time, reason will always be victorious in matters of social conflict. Neither Bosanquet's view nor that of Hobhouse fulfills the scientific canon of prediction. Broadly speaking, the Marxian theory of the state has so defined its nature and functioning as to enable us to predict with assurance the course its operations will follow. As an index to the problems of our age it decisively, in my judgment, holds the field.

On this basis, it follows that those who defend the classic theories of the state must be able to show that the actual states that we know, England, France, Germany, the United States of America—not an ideal state which exists only in their own construction—are inherently capable, granted the class relations they maintain, of fulfilling demand on the largest possible scale, and that, therefore, they have a moral claim to the allegiance of their members. I do not myself see how this could be argued logically for, say, a Jew in Hitlerite Germany, or a socialist in Fascist Italy; each refuses to take the announced purposes of the state as embodying intentions related to his actual good, for the individual member of any political society is bound to infer its ends not from its proclamation of purpose, but from his judgment, based on his own experience, of that purpose in action. From this angle, we are in a psychological condition comparable, as I have said, to the end of the feudal period, or to the epoch of the French Revolution, when men sought to reconstitute the foundations of society. This they are now, as then, unable to do unless they redefine its class relations. They cannot redefine them without possession of the state power since it is in the use of its coercive authority that the means of redefinition are to be found.

## III

This, as I see it, is the general problem that we confront. I propose to apply the result of my argument to the problem of the nature of law. The lawyer approaches the law as a body of rules binding upon those who come within its jurisdiction. The explanation of its binding force is, of course, of a varying character. To Hobbes and Austin it was the power behind the rules, the coercive sanctions that could, in the last resort, be brought into operation against those who infringed it. They sought to make, as in our own day Kelsen has tried to make, a self-consistent theory of pure law into which neither ethical nor sociological considerations could penetrate. Law, on this view, was completely separated from justice on the ground that this latter concept introduces nonjuristic postulates foreign to the nature of law. On this view, the authority of law ultimately derives from the final norm in a series—the State—and this norm, in its turn, is a postulate incapable of examination since, as the supreme source of authority, it cannot be called into question.

Granted its postulates, I believe the pure theory of law to be unanswerable; but I believe also that its substance is an exercise in logic and not in life, for we know in fact that the law of any given society is the expression of the push of social forces in that society, and we cannot explain its substance or its operation without regard to those forces. That is why, in the last forty years, there has been a growing movement toward a less formal and more realistic jurisprudence. The relation between sociology and law has grown even more intimate; and a jurisprudence of formal concepts now satisfies few save the veterans of an earlier age.

What is to replace it? Law is regarded as binding because it is useful, or because it embodies reason, or because it expresses the general ends of society in particular rules, or because it is a search

for those canons of behavior the observance of which will maximize the satisfaction of demand. From the angle of this paper, none of these answers is satisfactory. To say that law is useful is to ask at once, To whom is it useful? and that is always a question to which the most various answers can be given. To say that it embodies reason is merely to raise the enquiry of whose reason it embodies. To say that it expresses the general ends of society is to ask, As conceived by whom? At every point, in short, the ideal purpose of law is not necessarily identical with the actual purposes of law as these are experienced by those who receive the law.

But the law is, normally, obeyed. What explains the fact of normal obedience? Is it fear, habit, consent, or utility? No doubt, in some degree, it is all of these. Yet to offer them as explanations does not explain the nature of law. To understand it we must grasp the nature of the authority upon which it rests. In the last analysis, this is always the supreme coercive power of the state; for it is this power which is called into operation to prevent or to punish infractions of the law. But since, again in last analysis, the object of the state is to maintain some given system of class relations in society, the laws behind which it puts its supreme coercive power will have this end also. Ultimately, therefore, law is a body of rules which seeks to fulfill the object of the state. The rules are maintained because, normally, those who dissent from the rules are not in a position to challenge the authority which lies behind them.

From this standpoint, we can answer the questions I have already set. Law in a feudal state is made as law because it is useful to the owners of land; the reason it embodies is their reason; the general end of society it seeks to fulfill is their conception of what that general end should be; the canons of behavior it will seek to enforce will derive from their conception of how demand may best be maximized. In a capitalistic society, like Great Britain for

instance, the substance of law will, similarly, be predominantly determined by owners of capital. In a socialistic society, like Soviet Russia, the substance of law will be determined by the fact that the common ownership of the means of production subordinates the interest of a class to the interest of the society as a whole.

Recent work in jurisprudence gives this view a status with which the last generation was unfamiliar. The proceedings of the American courts, to take a notable instance, in the use of the injunction, in the interpretation of the Fourteenth Amendment, in their reading of industrial conspiracy into the category of tort, in their attitude toward free speech and free assembly are all pervaded by the notion, often hardly conscious in the individual judge, that the purpose of the law in fact is, whatever its ideal professions, to maintain existing class relations. It represents the use of the state's supreme coercive power for this end and for no other end. American constitutional law is, no doubt, elastic enough as a broad statement of principles. When it fails to be applied by the judges, it is, in general, permeated by a philosophy that prevents a change in class relations being introduced through the interstices of law.

The same is true of Great Britain. The interpretation of trade-union law, of much of the jurisprudence surrounding workmen's compensation, the law of search, the law relating to freedom of speech and assembly (especially in these last critical years) derives its meaning from judicial belief that the existing social order (that is, the existing system of class relations) must be maintained. At bottom, only the Marxian interpretation of law can explain the substance of law; that is, there cannot be equality before the law, except in a narrowly formal sense, unless there is a classless society, for the unstated assumption of all law in any society in which the instruments of production are privately owned is the inherent necessity of maintaining the system of class

relations through which the privileges of private ownership are secured to their possessors.

This conclusion, it should be added, is not invalidated by either of two considerations. The lawyer's search for consistency always seeks to build a legal system that is internally logical; the history of the law of torts is an interesting example of this effort. But the essential shape of his effort is, despite the reaction of the search for consistency upon the material, inescapably set by the relations of production in any society at any given time. Nor is it invalidated by the fact that lawyers, like most other men, search for the good of society in the rules they evolve. They search for the good of society as they see it; and they see the good, broadly speaking, in terms of an experience in which they are placed by the relations of production in which they are involved. The economic philosophy of those who made the Napoleonic Code, of Chief Justice Marshall, of Baron Bramwell, and of Lord Farwell is stamped unmistakably on the whole fabric of their work. Each of them was serving the law to the best of his great ability; but each brought to that service a body of class prepossessions of which he was definitely the prisoner. Here and there a remarkable individual, like Justice Holmes, may show a noteworthy power to transcend those limitations. But such remarkable individuals are rarely lawyers successful enough, granted our technique of judicial appointment and promotion, to reach the bench.

Therefore, just as there is a crisis in the theory of the state so, also, there is a crisis in the theory of law. None of its characteristic landmarks has gone unchallenged. It is especially notable that liberal theories of the law, which seek to utilize the new sociological relationships of law, are not less helpless than the older theories in grappling with the central problem. Dean Pound, for example, has, with great learning and energy, proposed an "engineering" theory of law. This he defines as "think-

ing not of an abstract harmonising of human wills, but of a concrete securing or realising of human interests." But Dean Pound nowhere discusses the relation of this "concrete securing or realising" to its inescapable consequences to a society whose class structure predominantly confines the "human interests" realized or secured to the interests of those who have effective demands to make, *i.e.*, the owners of property. At bottom his whole philosophy, like that of Kohler, is really a Hegelian plea that the law should be penetrated by that mystic entity—the spirit of a new time. He wants law, as it were, kept up to date; but he has wholly failed to see that this is, in fact, like all Hegelian philosophy, merely a beatification of the *status quo* of any given society at any given time. By refusing to see, with Marx, that legal relations are rooted in class relations, Dean Pound has thrown away the essential answer to the problem of what "human interests" will be "secured or realised" in a society of given class relations or one in which the power of class over class has been abolished.

The new approach has, necessarily, a different technique of analysis. It conceives of law always in the context of a state supporting a given system of class relations and it is always in this context that it finds the clue to its necessary substance. Law, in this view, is those rules of behavior which secure the purposes of the society's class structure and which will, if necessary, be enforced by the coercive power of the state. They are obeyed as long as the relations of production enable the full potentialities of the society to be explored; they will be challenged when the forces of production are in conflict with the relations of production and this exploitation is no longer possible. Whenever this conflict occurs the foundations of law are called into question. A struggle for their reconstruction takes place; and, if those who challenge the law are successful in their effort, they move to the use of the state power to redefine the legal postulates of society. It is upon



the basis of this conception alone that the movement of juristic thought can, in its fundamental outlines, be explained.

#### IV

During the war and its immediate aftermath, an attack was made by a group of thinkers, usually called the pluralists, upon the sovereignty of the state. As I was perhaps as much concerned as any one in the formulation of the doctrine, it will perhaps not be wholly out of place for me to explain the nature and purpose of the attack.

It was born essentially of two things: the state claimed legal omnicompetence; and it claimed the allegiance of its citizens on the ground that it represented the total interest of the society within its territorial jurisdiction. The pluralists pointed out that legal omnicompetence was a purely formal concept often invalid in fact; and they argued that the claim to allegiance could not be *a priori* valid since the allegiance of men was, in fact, plural and not single—that they were frequently presented with choices in which they made their decision without regard to the formal pre-eminence of the state. The pluralists therefore argued that the state, however majestic and powerful, was in fact only one of many associations in society; that, in experience, there were always limits to its powers, and that these were set by the relation between the purpose the state sought to fulfill and the judgment made by men on that purpose. They insisted that the state's title to obedience lay not in the fact of its willing, but in the substance of what it chose to will as this met the experience of men seeking to satisfy the demands born of their experience.

As a matter of history, it is clear enough that this pluralism was born, in part, of reaction to the Moloch-like demands of the state in wartime. In part, also, it derived from the realization that the

state's claim to preëminence always means, in fact, the sovereignty of a government composed of fallible men whose intentions alone are not a sufficient justification for so vast a claim. There went into the making of pluralism a historic analysis derived from the conflict between churches and the state; between, as in the case of the conscientious objector to military service, the individual and the state.

What, as I think now, was right in the pluralist doctrine were its perceptions (1) that a purely legal theory of the state can never form the basis of an adequate philosophy of the state; (2) that the state is, in fact, no more entitled to allegiance than any other association on grounds of ethical right or political wisdom; and (3) that its sovereignty is, at bottom, a concept of power made valid by the use of a coercion which, in itself, is morally neutral. Society as a complex whole is pluralistic; the unified power of the state, which we call sovereignty—that legal right, as Bodin put it, to give orders to all and to receive orders from none—is made monistic (as in the classical legal theory) by the fact that it has behind its will, on all normal occasions, the coercive power to get its will obeyed.

The weakness, as I now see it, of pluralism is clear enough. The doctrine did not sufficiently realize the nature of the state as an expression of class relations. It did not sufficiently emphasize the fact that the state was bound to claim an indivisible and irresponsible sovereignty because there was no other way in which it could define and control the legal postulates of society. It was through their definition and control that the purposes of any given system of class relations were realized. If the state ceased to be sovereign, it ceased to be in a position to give effect to those purposes. Its preëminence was, therefore, inevitably claimed on that ground. The ethical characteristics attributed to it by philoso-

phers like Hegel were nothing more than a protective coloration for the end the state was bound to fulfill as the expression of the relations of production in any given time and place.

That realized, I submit, the purpose of pluralism merges into a larger purpose. If it be a fact, as I have here argued, that the state is inevitably the instrument of that class which owns the instruments of production, the objective of the pluralist must be the classless society. In that event there is no room for, because there is no need of, the state's supreme coercive power. It then becomes possible to conceive of a society in which (1) men have an equal claim on the common good and (2) differentiation in response to that equal claim can be so made that the good of those differentiated against is involved in the good of those in whose favor differentiation is made. In such a society we remove those conflicts based on property which, as James Madison saw and said, are "the only true source of faction." It is these conflicts which normally render necessary the vast apparatus of state coercion. If the main ground of conflict is thus removed, it becomes possible to conceive of a social organization in which the truly federal nature of society receives institutional expression. And in such a social organization, authority can be pluralistic both in form and expression. The prospect of immense institutional changes comes at once into view.

This is not the place for me to venture upon any full treatment of the problems to which this outlook gives rise. It is, perhaps, sufficient for me to say here that I now recognize (as far, at least, as I am concerned) that the pluralist attitude to the state and law was a stage on the road to an acceptance of the Marxian attitude to them. Only by means of Marxism can I explain phenomena like the state as it appears in fascist countries. That state seeks the total absorption of the individual within the framework of its coercive apparatus precisely because it is, nakedly and without

shame, what the state, covertly and apologetically, is in capitalist democracies like Great Britain or the United States. To limit its power, as the pluralist sought to limit its power, we must destroy the class structure of society, for the state is simply the executive instrument of that class which owns the means of production. When a class society in this sense is destroyed, the need for the state, as a sovereign instrument of coercion, disappears; in Marx's phrase, it "withers away." As that is achieved, both the nature of authority and the law it ordains undergo a fundamental transformation.

## V

During the war period it was widely assumed that the universal attainment of democracy was the highest political objective before mankind; since the war it has had a decreasing empire over the minds of men. Not a little of the present confusion in political theory is the outcome of a failure to state in anything like adequate terms the problems to which this change in the mental climate of our time has given rise. Men have been asked to accept a formal political democracy as good in itself without considering the complex economic relationships in which that formal political democracy is involved. In every state in the modern world save Soviet Russia the essential fact that must be the starting point of political analysis is that the capitalist mode of production there prevails. The ownership of the means of production is in a comparatively small number of hands, and this narrow basis of economic power is in wide contrast to the broad basis of a political power that, as in England and the United States, is usually based upon universal suffrage. The difference is important since it means that the motives to production in a capitalistic society are in contrast with the theoretical end a democracy seeks to serve. In a capitalistic society the motive to production is profit for the

owner of the instruments of production. In a democracy the citizen seeks, by the use of his political power, to use the authority of the state to increase the material well-being at his disposal.

This union of economic oligarchy and political democracy worked well enough so long as capitalism was in its phase of expansion. Its triumphs, in Great Britain and the United States, are too well known to need description here. But generally in the last thirty years, and particularly since the war, capitalism has entered into a period of contraction from which it seems neither able nor likely to emerge. Its power to produce increases indefinitely; its power to distribute is continually less effective. The system of ownership that gives rise to the relations of production is in contradiction with the forces of production. As at the end of the feudal period, a redefinition of class relations has become necessary if we are to secure a full exploitation of the resources at our disposal.

But here the difficulties of capitalist democracy come into the foreground. The concern of the capitalist is profit; the concern of the masses is material well-being. When the contraction of the economic system limits profit making, the results are unemployment and a lowered standard of living. This can be met for a period. But since the masses use their political power to insist, at some stage, on an increase of material welfare, they are driven to attack the class relations in which they are involved, in order to secure it. Their political power then becomes a challenge to the economic power of the owning class. The latter then has the alternatives of coöperating peacefully in the redefinition of the legal postulates of the state or of suppressing a democratic system in which their privileges are threatened by the voting power of the masses.

The coming of fascism, as in Italy and Germany, is an example of what is meant by the suppression of a democratic system. The

right of the majority to decide how it wants to be ruled is destroyed. The characteristic institutions of the working classes—the trade unions, the coöperative societies, the socialist party—are overthrown. The fascist party, invariably in union with big business and the defense forces of the state, is then in a position to alter the constitution of the state in the interests of the owners of economic power. Dictatorship is established; and while it is announced, of course, that this has been done in the interest of society as a whole, what is notable is that its results are always built (1) upon the forcible suppression of recalcitrant elements and (2) upon a lower standard of life for the masses. Fascist dictatorship enables the uneasy marriage between capitalism and democracy to be dissolved by the simple expedient of forcing the masses, by terror, to renounce their claim to increased material welfare. It is vital to the understanding of this process to recognize that, under it, the class relations typical of capitalism remain unchanged.

From this angle, the problem of democracy in our time is, relatively, a simple one. There is no effective evidence to suggest that, as a method of government, it is any less efficient than in the past. What has happened is that the entrance of capitalism into the phase of contraction has brought into vivid perspective the contradiction between the ends of an economic oligarchy on one plane and those of a political democracy on another. This contradiction threatens the security of members of the owning class. They begin to see the democratic system in the light of a threat to their security. They insist that democracy must conform to the end capitalism seeks to serve. They ask for sacrifices in the belief that these will be temporary; when their temporary character is thrown into doubt they begin to use the state power to repress the criticism or attack they fear. If these actions are not enough to restore the security which they fear to have challenged, as in Italy

and Germany, they frankly abandon their belief in political democracy.

This is, of course, to state starkly a situation that is far more complex, especially in its psychological aspects, than I have here attempted to set forth. But in its large outlines it is, I believe, the essential key to the problem of democracy at the present time. It alone explains such legislation as the British Trade Union Law Amendment Act of 1927, or the use of the Supreme Court to declare unconstitutional so much of President Roosevelt's legislation. When Justice Roberts can declare the Railroad Retirement Act of 1934 unconstitutional on the ground that, under the Fifth Amendment, the "means adopted" do not bear "any reasonable relation to the ostensible exertion of the power," he substitutes, in fact, his conception of what "reasonable" and "ostensible" mean for that of Congress; the words are taken to narrow the authority of Congress while they widen the latitude of judicial interpretation. Put in another way, Justice Roberts is arguing that the Fifth Amendment reads as he proposes to read it, protecting railway shareholders from any legal obligation to give pensions to their employees even when Congress believes that they should assume this legal obligation. The function of the Supreme Court, from this angle, becomes that of safeguarding the owners of capital from the results of a legislative effort to increase the material well-being of the masses. Taking President Roosevelt's legislation as a whole, the attitude of the courts to it may be broadly described as an insistence that political democracy shall not seriously interfere with the habits of a capitalistic society. This attitude is the more important since President Roosevelt has not attempted to undermine those habits, but only to make such concessions to mass well-being as will, in his judgment, preserve the stability of capitalistic society. The Supreme Court, in essence, is saying that its conception of what is "reasonable" may be substi-

tuted for that of the president and Congress whenever it thinks fit. It becomes, in short, the protective rampart of capitalism against any attempt of democratic invasion it dislikes.

The British situation is different in form, though not in substance. The problem of the Labor party there is to maintain the validity of democratic rule if and when it attains a majority in the House of Commons, even though it attempt socialist legislation. Its opponents seem willing to mobilize against any such effort the powers of the Crown, the House of Lords, and the investing class. It remains a grave question whether the Labor party could, as a government, successfully challenge the combination of these forces. A parallel position, again different in detail, exists in France; and, though socialist governments exist in Scandinavia, it is important that none of them has ventured to introduce socialist measures. What appears to emerge from the postwar experience is that capitalism is willing to suppress democracy rather than forego the privileges which accrue to ownership under the system of class relations that it involves. No state in modern history, in fact, has been able, so far, to change its class basis without revolution. The crisis in democracy is due to the fact that in the present phase of capitalistic contraction its alliance with democracy is dangerous to the owners of property who, as in the past, prefer to fight for their privileges rather than give way. The history of Soviet Russia since 1917 lends additional weight to this interpretation.<sup>3</sup>

## VI

The central problems of postwar international law lie in the economic relations in which they are involved. Scientific advance, especially in the means of communication, has produced a world market; and in that situation no state can live a life in which it affects itself alone. The American silver policy may de-



termine the economic position of China; the Canadian monopoly of tungsten may determine the effectiveness of German rearmament; Great Britain's departure from the gold standard or her tariff policy may shape the economic life of the Scandinavian countries. We have reached so intense a degree of international interdependence that the theory of sovereignty has consequences, in foreign relations, of an entirely different character from those of the period when Grotius and his successors laid the fundamental bases of international law.

The world is divided into sovereign states, each of which is, in formal fact, the sole arbiter of the policy it will pursue. The making of war and peace, the scale of its armaments, its financial and economic policies, its attitude to colonial expansion—all these, to take a few examples, are matters upon which it recognizes no will superior to its own. What, then, is international law, and how far is it binding upon states?

International law may be defined as the body of rules which governs the relations between states; and its binding force depends upon their consent to observe the rules it imposes. If it is objected here that this attitude toward the nature of international law fails to take into account the existence of a well-settled body of rules by which all states conceive themselves as bound, the answer is that, in any final analysis, states regard themselves as free to break the obligations to which they are committed whenever they choose to do so. The existence of a body of juristic rules which, in minor matters, states accept because it is convenient for them to do so is not sufficient to give international law a status independent of their wills. In matters of major concern, as Japan has shown over Manchuria, and Italy over Abyssinia, they are not prepared to sacrifice to the claims of international law what they conceive to be their sovereign interests. They do not recognize its validity as superior to the will they make for themselves. There is

no organic community with a law of its own to which their own law is subordinate. The validity of international law depends upon their consent to its operation.

This view is not, I think, destroyed either by the existence of the League of Nations or by the fact that an adequate international life is now impossible unless at least the major wars are definitely outlawed, for what the experience of the last sixteen years has surely shown is the incompatibility of the League with the coexistence of sovereign states; and the latter display no sign of a serious willingness to abandon their sovereignty. They need it, in fact, for the protection of interests that cannot be promoted or maintained save by the technique of war. The ambitions of Japan and Germany, of Italy and Hungary, to take some obvious instances, assume a period when they will make demands upon other states which only the arbitrament of the sword can enforce; and recent experience seems decisive that they are willing to break legal obligations, however morally profound, in order to realize them. The answer of the League should be opposition in terms of collective security; but both the Manchurian and the Abyssinian incidents make it plain that collective security assumes the existence of an international community able and willing to act as an effective unit against an aggressor. No such possibility appears to exist within the framework of the present system. And while it does not exist, the binding force of international law is as great, or as small, as the strength of the aggressor who breaks it. It is a function of the power-politics which expresses the modern relationships of states; and power-politics cannot give rise to a social order in which international law has a status independent of the states that assent to it.

It is, in fact, inherent in the idea of law that those who live under it should be bound to obey its orders independently of their own wills, and that their infractions of its principles should be

punished by the infliction of penalties. For international law no such situation exists save as individual states choose to assume, and to be bound by, obligations of this kind. International law, therefore, is built upon postulates that are rather metajuridical than truly legal in their nature. Granted the postulates, all the results that follow are of a truly legal kind; but the sovereign nature of the state, in relation to the postulates, strikes them with impotence as soon as, in crucial instances, they seek to assume the full character of law.

Why is this? The answer, I suggest, lies in the understanding of the nature of the state. Since it exists to protect a given system of class relations, it cannot escape from the implications contained in them. Once a society lives by the profit motive and depends upon access to foreign markets for its satisfaction, it is bound, as the condition of its own well-being, to protect and promote that access. It then becomes involved in that complex web of imperialism which means the acquisition of colonies and spheres of influence, with military and naval forces to protect the acquisition. As the undeveloped territories of the world shrink, the rivalries between states for access to markets becomes ever more acute. Its purpose seizes hold of, and colors, the whole psychological contact between peoples. Almost independently of the wills of statesmen, as, most notably, in the war of 1914, the clash of objectives cannot be settled in terms of peaceful negotiation. The necessary outcome of the system, at some stage, is war; and war, it must be remembered, is the highest expression of the state's sovereignty.

To deprive the state of sovereignty, in a word, is to deprive it of the power to enforce the logic that is inherent in its economic system. Great Britain in India and Egypt, France in Morocco and Indo-China, Japan in Korea and Manchuria become impossible save in that context, for sovereignty means supreme coercive power; and, without this, the state cannot enforce a will to which

it is compelled by the class relations it exists to maintain. No doubt each state wants peace. But, given the consequences of its class relations, it wants, also, objectives which it cannot obtain or safeguard without the power to make war on their behalf; and it must retain its sovereignty in order to retain the right to make war. But once it retains its sovereignty it cannot be bound by any rule of international law save by its own consent, for, were it so bound, it would cease by definition to be sovereign.

The inference from this view is twofold. On the one hand, it implies that, given the class relations of the modern state, it is impossible to realize the ideal of an effective international community. A body like the League of Nations is bound to remain partial and incomplete, both as to structure and function, simply because, in order to achieve its aims, it must be able to transcend the sovereignty of its individual members. This it cannot do since, if they were to surrender their sovereignty, they would cease to be able to maintain those class relations for which they exercise supreme coercive power. On the other hand, it implies that the sanctions of international law are bound to remain, also, partial and incomplete since their ability to get themselves applied depends upon the consent of those who infringe that law; the alternative, when the transgressor refuses such consent, is the use of force against him from which, as the cases of Manchuria and Abyssinia have made evident, other states will shrink. There is no way of making international law more than what Austin called a species of positive morality save by the abrogation of state sovereignty; and this involves a revolution in the economic structure of the modern world.

This conclusion is not weakened by the effort of the Austrian school of international lawyers to remake the foundations of international law by postulating its primacy over municipal law. Their effort, which, given its postulates, is logically sound, is

nevertheless unrealistic. It is, for practical purposes, an essay in the optative mood. So long as the individual state remains sovereign the question of primacy remains a matter upon which it is itself, in each individual instance, free to decide; and postwar experience is surely decisive that such primacy will be disregarded by any state (if it can afford to do so) once it considers that such recognition will jeopardize interests it regards as fundamental. It is, no doubt, true that, among modern states, Spain has actually written into its constitution the recognition that international law has primacy over municipal law. But it is important to realize, first, that Spain has a lonely preëminence in this regard; and, second, that states which have signed either the Kellogg-Briand Pact or the Optional Clause have, for the most part, done so with significant reservations, amounting, in sober fact, to the retention of that right to make war, or to refuse arbitration, in such instances as they think fit. They have agreed, that is, to abrogate their sovereignty in those matters upon which they do not think it worth while to fight; but, for all fundamental matters, they remain not less distinctively sovereign than before.

We may agree that, granted the fact of international economic interdependence, this is an unsatisfactory position. It is unsatisfactory because we are living in a world in which the relations of production are in contradiction with the forces of production. A sovereignty that, in its origins, served the important purpose of freeing bourgeois society from the trammels of medieval canons of conduct now operates to prevent the transcendence of the contradictions of bourgeois society. The sovereignty of the great state today is a technique for the protection of its imperialism. That imperialism is the outcome of its own internal relations which, given distribution of effective demand within its boundaries, are driven to the competitive search for markets abroad in order to realize profit. Its sovereignty is the protective armament of that

adventure. The international law it can recognize is, therefore, always hampered and frustrated by the logical requirements of imperialism. It cannot part with the control of any vital function—the scale of its armament, the right to make war, its hold on colonies and spheres of influence, its power over tariffs, currency, migration, labor conditions—because to do so is to threaten, internally, the relations of production its sovereignty exists to maintain. But an international community, and, therefore, the law of such a community, cannot be real or effective unless it can control these functions independently of the wills of the states that are its constituent parts. To achieve the necessary consequences, that is, of the world market, we have to go beyond the power of the individual state to veto international action. We cannot, in fact, go beyond that power while the state remains sovereign; and we cannot deprive it of its sovereignty so long as, excluding Soviet Russia, the present class structure of society remains undisturbed.

The development of international law in modern times, and, especially, in the postwar period, is an admirable example of the lawyer's effort to reconcile consistency with postulates that deny the possibility of its full attainment. The best examples of this effort in recent years have been those of Lauterpacht<sup>4</sup> in England, and of the Austrian school. Each has striven to make of international law a truly legal system by discovering for it a power to bind its subjects indifferently of their will. Each has been able to find a mass of illustrative material—the existence of international servitudes is a notable illustration—that appears to bear out his case. But each effort has broken down before the crucial fact that the postulates from which it has to start are not broad enough to bear the weight of the superstructure founded upon them. At some point, the state may choose not to accept the obligations it has assumed; and, at that point, it always emerges that the validity of the obligation is self-determined. Once that is the case, the

incompleteness of the sanctions behind international law emerges with momentous clarity. They are operative only so far as states choose to make them so; and this willingness depends upon factors so powerful as to prevent international law from being, like municipal law, a complete and self-sufficient system.

The reason for this inadequacy is, of course, a simple one. Law cannot transcend the relations it is intended to enforce. Its ultimate postulates are never self-determined but given to it by the economic system of which it is the expression. Once the driving power of an economic system depends upon the profit derived from the private ownership of the means of production within a state, the sovereignty of that state must organize the relations of production within the framework born of that purpose. To its consequences, all the habits of the society dominated by the state will necessarily be adjusted, as well in the international as in the municipal sphere. To alter those habits, there must be an alteration, also, in the relations of production upon which they depend. So far, at least, that alteration has not been attempted, outside of Soviet Russia, in the modern world. The result is to confine the international lawyer to a medium in which his work is inevitably incomplete simply because the postulates from which he starts do not themselves constitute a complete system. To achieve that completeness, he would have to deal with states that accepted the findings of law as fully as the citizen in a municipal community. The starting point of his adventure is the fact that this is not and, within the present relations of production, cannot be the case. The international law he operates is, no doubt, inadequate to the purposes it now seeks to fulfill, but it will require a complete change in the foundations of our economic system to adjust its postulates to the new needs it encounters.

## VII

The crisis in *Staatslehre* that I have here described will not be solved in terms of discussion alone; ideas must wait upon the events which give them birth. The liberal ideology that, both in the Old World and the New, is now challenged, becomes, in the perspective of history, the expression of a particular economic system upon whose fate it is dependent. That system made individual ownership of the means of production the pivot of its way of life; and to the realization of that end it shaped first the culture and then the political institutions of the medieval world it displaced. By reason of its emphasis upon such individual ownership, it shaped all the foundations of law, both public and private, to that end. Its validity, as an ideology, depended upon its power so to exploit the forces of production as to satisfy, on the largest possible scale, the demands that it encountered. So long as it seemed to fulfill that condition it was able to represent itself, and to be accepted, as universal, though in fact a theory limited by a specific environment. But as soon as its power of satisfaction diminished—which, roughly, has synchronized with the contradiction between its power to produce and its power to distribute—its adequacy as an ideology became doubtful to all whose expectations of material benefit from its operations were disappointed.

No doubt the achievements of liberalism were great; the higher standard of living that it has universally effected is beyond discussion. But once it ran into the period of its material contradiction, what was revealed was the narrow and formal character of the institutional system by which it lived. Its political democracy, even on the basis of universal suffrage, did not mean, indeed hardly pretended to mean, a recognition of an equal claim to a share in the common good; what political democracy could se-



cure was always limited by the power of an economic oligarchy to exact privileges prior in status to the claim of the masses to benefit. Its equality before the law was, again, almost always more substantial in form than in practice for the simple reason that the principles of the law were always, if rarely consciously, anchored in the assumption that the protection of private ownership was the fundamental purpose of the law. The ideology, in a word, of the liberal state favored reason and toleration only on the implicit condition that these, as they worked, did not threaten the economic foundations of the regime itself.

But reason and toleration are attitudes of mind in human beings. They depend upon an environment about which men feel passionately. Their empire functions only as legitimate expectations are fulfilled by those who have formed them. When those expectations are insecure, men are no more capable of service to reason and toleration than they have been in past ages. Their ideas of right and wrong are largely born of their position in society; and when this, with its profound habituations, is challenged, now, as in the past, they go forth to do battle in behalf of their ideas of right and wrong. Liberalism is challenged in our own day for the same reason that feudalism was challenged at the end of the fifteenth century; within the framework of the class relations it imposes, it is unable adequately to exploit the forces of production. So challenged, it defends itself; and the conflict between the forces it represents and those by which it is attacked has led to the crisis in state theory which has been here analyzed.

What the outcome of that crisis will be it is as yet too early to say. Much, clearly, depends on whether the capitalistic system has latent powers of recovery more profound than have yet been made apparent; much, also, upon whether the experiment of Soviet Russia is able, within a measurable period, to develop for its citizens a standard of living which compares favorably with that of capitalism.

Certain it is, also, that the capitalistic system, in its imperialistic phase, must avoid the danger of war if it is to preserve any vestige of liberal ideas, for war means an organization of social life so rigorous that the conception of individual rights cannot hope to survive its onset. Were it to come, the private ownership of the means of production could be maintained only by a fascist dictatorship so stark as to resemble in its intensity the worst forms of Oriental despotism. Even then, it may be argued, it is doubtful enough if such a dictatorship could, over any considerable period, attain stability. Its relations of production would continue to exhibit that contradiction with the forces of production that is the cause of the present crisis. It would be a government of naked coercion, and, thereby, it would fail to meet that essential test of all governments—which is the transformation, at some stage, of the processes of coercion into the processes of consent. But, historically, this transformation is achieved only in those epochs where the relations of production correspond to the forces of production; this correspondence, inherently, a fascist state is unable to attain. Its emergence, therefore, offers no more to the owners of economic power than a temporary and hazardous breathing space before they encounter a new challenge, for power is always held upon the condition that its possessors are able to confer increasing material well-being upon the masses. This no fascist system is able to do for the simple reason that it starts from a premise incompatible with the achievement of that increase. It is, by its nature, an attempt only to arrest in the interest of privilege the decay of that capitalist enterprise which has now passed into its phase of final contraction.

This position need cause us no surprise. The characteristics of our age have always marked the last phases of an economic system in decay. Skepticism of accepted values, lack of self-confidence in the ruling class, increasing hostility to traditional authority, the making of new social principles to fit new needs,

the attack, in a word, upon the foundations of the old order—these were symptomatic of the Reformation and the French Revolution as they are symptomatic of our own time. Then, as now, the traditional social discipline—which is another phrase for the system of class relations—inhibited the full exploitation of scientific discovery. Then, as now, this incompatibility produced profound social antagonisms which issued in widespread conflict. Then, as now, a rising social class assumed the offensive by denying the right of those who lived by the traditional ways to the privileges inherent in their position. Then, as now, also, those whose right was denied were so convinced of the legitimacy of their claim that they preferred, as they always have preferred, to fight rather than to give way.

In essence, the historic movement from the Reformation to the French Revolution is the history of the advance of the middle class to full political status. As it advanced, it transformed political and legal philosophy to satisfy the claims it had formulated. Once it had captured the state, it sought, as all classes seek, to make rigid and unassailable the boundaries of its empire. For something like sixty years it was successful in that effort because it was able to confer increasing material benefit upon the workers; hence, in that period, its feelings of security and self-confidence.

But, for something like the last generation, and, with immense rapidity since the war, the ability of this movement to satisfy at once its own claims and those of the workers has declined. With that decline has come doubt, increasing in volume, of the system by which the movement lived. An alternative social hypothesis has come into the field which, as in Soviet Russia, has assumed the significant panoply of an armed state. Russia represents a new way of life, built upon foundations that threaten the supremacy of the traditional order. Its challenges awaken in that order the sense of insecurity and danger that has always made a privileged

class arm itself in its defense. The crisis in the theory of the state is no more than the ideological expression of this conflict between tradition and experiment.

This conflict shows itself as a crisis in the theory of the state simply because, when a new class is advancing to power, it is bound to capture the state for the achievement of its ends. Thereby it becomes possessed of the ultimate authority in society; thereby, that is, it can give orders to all and receive orders from none. To capture the state power is to have authority to redefine, for new purposes, the legal postulates of society. These, at bottom, are always no more than principles which determine in what way the social product shall be distributed. They attach, to the claims men make, the sanctions supreme coercive power in society is able to enforce.

Our age is watching a debate in legal philosophy the intensity of which measures with some precision the degree to which the traditional conception of the state power is in jeopardy. As always in the past, a challenge to legal ideas is the harbinger of a revolutionary tune. The supreme problem for the jurists of this epoch is the need to awaken to the responsibilities of the issue they confront. For only a realistic awareness of what that issue fully implies can save us from the grim rigors of a new dark age.

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NOTES

<sup>1</sup> POUND, *SPIRIT OF THE COMMON LAW* (1921) 195.

<sup>2</sup> *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330, 347-348, 55 Sup. Ct. 758, 761-762 (1935). On this see the pungent comments of Professor T. R. Powell in the *Harvard Law Review* for November 1935 at 1 ff.

<sup>3</sup> The problems here summarized are dealt with at length in LASKI, *DEMOCRACY IN CRISIS* (1933), and LASKI, *STATE IN THEORY AND PRACTICE* (1935).

<sup>4</sup> Cf. LAUTERPACHT, *PRIVATE LAW ANALOGIES IN INTERNATIONAL LAW* (1927) and *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933); for the Austrian school cf. especially VERDROSS, *DIE EINHEIT DES RECHTLICHEN WELTBILDES* (1923). On the whole problem cf. LASKI, *STATE IN THEORY AND PRACTICE* (1935) c. 3.

## THE SCHECHTER CASE—LANDMARK, OR WHAT?

EDWARD S. CORWIN

**C**HAMPIONS of the Supreme Court's decision in the *Poultry Case* (*Schechter v. United States*)<sup>1</sup> thank God that "the Constitution still stands" but others have asked if the decision does not mean, rather, that the Constitution stands *still*.<sup>2</sup> Certainly no question concerning a constitutional decision could be of greater moment. The Court has long since absorbed, for most purposes, the function of amending the Constitution. If it has now abruptly gone on strike the country may presently find itself in an exceedingly embarrassing position.

The founder of our constitutional law was under no misapprehension on this point. Even in asserting that the Court had the power and duty to pronounce "void" any act of Congress found by it to transcend the powers of that body, Marshall also declared that the Constitution was "intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs,"<sup>3</sup> and he proceeded forthwith to make such an adaptation in the case then pending before the Court. That is to say, the Court's "guardianship" of the Constitution was recognized as involving a certain responsibility to "the undefined and expanding future" for which the framers of the instrument had intended it.<sup>4</sup> By the same sign, President Roosevelt's complaint that the Court had in the *Poultry Case* "reverted to the horse and buggy days"<sup>5</sup> calls for a certain amount of clarifying explanation if it is to be justified. If the President had in mind "the horse and buggy days" of 1789, or even of a generation later, his words cast an unwarrantable aspersion on the statesmanship that established

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the Constitution, and the statesmanship that initially interpreted and applied it. If, on the other hand, he had in mind "the horse and buggy days" of 1889 or thereabouts, his utterance appears in a different light, as will be made plain in due course.

There are those, to be sure, who take the position that the Court did wisely to put the question "squarely up to the people" whether the national government should exercise such powers as those which the decision in the *Poultry Case* denies it. This seems to be the position, for instance, of Senator Borah, as also it is of the distinguished professor of Constitutional Law at Columbia University. The latter has recently written:

"It seems unmistakable, then, that, despite all efforts to circumvent the plain prescriptions of the Constitution as expounded by the Supreme Court, no fundamental change in our economic system, no far-reaching alteration in the relations of government to business, can be brought about without changing the Constitution. And this is as it should be. We should not rush or drift into such important changes upon the high tide of an emergency. The common man should understand what is up."<sup>6</sup>

"Plain prescriptions of the Constitution as expounded by the Supreme Court"—a delightful example of what the dictionary terms *contradictio in adjecto*, which no doubt Dean McBain concocted with his tongue in his cheek. That, however, is by the way. Our real concern with the learned dean's reflections is centered upon his contention that "the common man should understand what is up." Again one suspects an essay at drollery. Did "the common man" understand "what was up" in the *Poultry Case*? If so, "the common man" had the advantage over many puzzled members of the legal profession. And does "the common man" understand what has been up all the time the Supreme Court has been manipulating the commerce clause of the Constitution? If

so, the many volumes which have been written to elucidate the subject would seem to have been time largely wasted, and the Scriptural phrase "out of the mouth of babes and sucklings" receives confirmation in an unexpected quarter. And would "the common man" know what was up if an amendment was proposed to give Congress the powers denied it in the *Poultry Case*? To say the least, it seems doubtful.

On the other hand, that the decision in the *Schechter Case* did reflect the understanding of "the common man," in the sense of his *lack* of understanding and consequent inability to choose regarding the larger relationships of government and business to-day, is no doubt true. This was perceived at once by Sir Josiah Stamp, who was visiting this country at the time the decision was handed down. Thus he reports:

"I found also that the popular reaction to the Supreme Court decision on its constitutional side was paradoxical. It is appreciated that the economic life of the country should be looked at as far as possible as a whole, to secure the maximum advantage; it is also realized that economic forces do not lie State-confined. The boundaries of the States are singularly artificial; they are generally neither rivers nor mountains, but imaginary lines on a map, which cannot permanently prevail against underlying economic forces. It must, therefore, be made possible for Washington to act on an embracing and comprehensive scale in economic affairs, yet the idea of a transfer of State rights to the Federal Government meets with every kind of psychological resistance ... in such matters the average mind in the States is as old in its outlook as the Constitution itself."

In short, the decision did not clarify—it did not lend that light and leading which have sometimes been urged as the best justification of the Court's constitutional prerogative—if anything, it left popular muddlement worse confounded. One implication of Sir Josiah's words should, however, be corrected. It is not true

that the outlook of the Constitution is as "old" as that of the average mind in the matters mentioned by him—*old*, that is, in the sense of obsolete and no longer practicable. If we may attribute to the Constitution the outlook of its framers, that was *mercantilist* rather than *laissez faire*, and contemplated not a little activity on the part of government in the field of business enterprise, as Hamilton's "Report on Manufactures" goes to show. The forces of *laissez faire* were slower in assembling; nor has *laissez faire* to this day ever prevailed when it has been a question of government's *aiding* business.

## I

The salient facts of the *Poultry Case* were as follows: Here defendant company, wholesale poultry dealers in New York City, were charged with having violated the Live Poultry Code set up by President Roosevelt under the National Industrial Recovery Act, first, with respect to minimum wage and maximum hour requirements, and, secondly, by according preferential treatment to favored customers. It was conceded that most of the poultry handled by the company reached it, via commission men, from outside the state and hence through the channels of interstate commerce. It was conceded, too, that the only authority which Congress could claim over such a business must arise in its power to "regulate commerce among the several States," and its resultant power to foster and protect such commerce. The Court exonerated the defendants, first, on the ground that the Live Poultry Code represented an unconstitutional delegation of legislative power by Congress—a phase of the case with which this article is not concerned—and, secondly, on the ground that defendants' business was not subject to Congress anyway, being (1) neither interstate commerce in itself, nor (2) closely enough connected therewith to bring its conduct in the particulars above



mentioned within Congress's regulatory and protective power. Before, however, taking up either of these two aspects of the Court's application of the commerce clause, we must give a moment's passing attention to a preliminary feature of the Chief Justice's opinion.

"We are told," the Chief Justice recites, "that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. . . . Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." "

Just what meaning these carefully balanced phrases cancel down to is not entirely clear. Certainly, if "extraordinary conditions may call for extraordinary remedies" and this fact has to be considered "when the exercise of power is challenged," then to people unacquainted with legalistic jargon, or not disposed to be unduly impressed thereby, it would seem that "extraordinary conditions" *do* "enlarge constitutional power." Assuming, however, that it is the Chief Justice's design to pronounce "a death

sentence" upon the emergency concept which has hitherto had some place in our constitutional law,<sup>9</sup> then it must be admitted that much is to be said, in modern unsettled conditions, for such a procedure—*provided* the necessary corollary thereof be recognized; namely, an enlarged interpretation of the *normal* powers of government. Unfortunately, nowhere in his opinion does the Chief Justice evince the least recognition of such a corollary. Instead he adopts the Pollyanna attitude—we have always pulled through and we always shall, whatever version of the powers of the national government is daily promulgated by the Court.<sup>10</sup>

We are thus brought to the Court's construction of the commerce clause. That it was unnecessary for the Court to pass upon this aspect of the case is, of course, evident. The case had already been disposed of, so far as defendants' interest was concerned, by the holding that the Live Poultry Code represented an exercise of power which, even though Congress had been held to possess it, could not have been constitutionally delegated. In other words, "the law of the case" had already been sufficiently ascertained to determine its outcome for the parties to it; and "the authority to ascertain and determine the law in a given case" is, as the Court itself has said, the sole source of its power of judicial review.<sup>11</sup> In thus straying beyond the strict precincts of its judicial duty, the Court, no doubt unwittingly, lent countenance to the theory, which its present champions have vociferously seized upon and greatly magnified, that it has a specific function of guardianship of the Constitution, so that any one, be he even President of the United States, who criticizes its exercise of this supposed function thereby writes himself down as an enemy of the Constitution. The same position was taken in 1857 by defenders of the Court's comparable performance in the *Dred Scott Case*.<sup>12</sup>

The first question passed upon by the Court in relation to the commerce clause is whether defendants were engaged in "com-

merce among the several States," and this question is answered "No." Once the poultry they dealt in reached them, says the Chief Justice, "interstate transactions in relation" to it "then ended." Continuing, the opinion reads:<sup>13</sup>

"Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. . . .<sup>[14]</sup>

"The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce, and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here."

For a reason that will soon appear, this feature of the decision is of minor importance. Nevertheless, one or two comments upon it are in point for the light they shed upon the major problem before the Court under the commerce clause. The earliest case cited by the Chief Justice in support of his assertion that the Schechters' business did not comprise "transactions in interstate commerce" is *Brown v. Houston*,<sup>15</sup> decided in 1885. Here the Court

held that a bargeload of coal from Pennsylvania which had arrived at New Orleans and was being held in the river before that town "for sale or disposal" had become a part of the mass of property in Louisiana, and as such was subject, "*in the absence of Congressional action,*" to the local taxing power.<sup>16</sup> The Chief Justice overlooks the qualifying phrase underscored above and the oversight is material, for the phrase evidently implies that Congress would have been free to treat the coal as still in interstate commerce or at least as so closely connected therewith as to be within its regulatory power. And the cases are numerous in which the protection of the commerce clause has been held to continue until goods brought from without a state reach a purchaser who intends to consume them.<sup>17</sup> And where the protection of the clause reaches, the power which it confers must reach also, the former being, indeed, only a deduction from the latter.

But the National Industrial Recovery Act was not confined to transactions *in* interstate commerce; it also purported to govern transactions *affecting* such commerce, and it is from this feature of the Act that the major constitutional issue of the case touching Congress's powers arose. As the Chief Justice's opinion concedes,<sup>18</sup> "The power of Congress extends, not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations."<sup>19</sup>

He then proceeds to illustrate this proposition as follows:<sup>20</sup>

"Thus, Congress may protect the safety of those employed in interstate transportation, 'no matter what may be the source of the dangers which threaten it.' . . .<sup>[21]</sup> We said in . . . [Second Employers' Liability Cases] . . .<sup>[22]</sup> that it is the effect 'upon interstate commerce,' not 'the source of the injury,' which is 'the criterion of congressional power.'

We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. . . .<sup>[23]</sup> And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act . . . because the conspirators seek to attain their end by means of intrastate activities."

But, the Chief Justice continues:<sup>24</sup>

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, *there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle.*"

Applying, then, this distinction to the instant case, he says:

"This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted, not upon direct charges of injury to interstate commerce or of interference with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of conspiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions—as to hours and wages of employees and local sales—'*affected*' interstate commerce."<sup>25</sup>

The initial question with respect to this holding is whether it should be treated as growing out of the peculiar facts of the *Schechter Case*, and hence as limited to those facts, or whether it was meant by the Court to have a much wider application—

whether, indeed, the Court intended to lay down doctrine which would be equally applicable to Congressional regulation of wages and hours in the great manufacturing and extractive industries, such as steel, oil and coal, and so on. To this interesting question no certain answer can be returned until the Court has spoken further, and then, perhaps, no answer will be necessary. Nevertheless, I am reluctantly inclined to agree with Mr. Jouett Shouse's new super-Supreme Court that the wider interpretation of the holding is probably the correct one—at any rate, the one intended by a majority of the *present* Court.

Certain circumstances in connection with the case do, no doubt, support the narrower theory of its meaning, but only equivocally when they are scrutinized. Thus if the Chief Justice's dismissal of cases involving the "stream of commerce" concept had occurred in connection with his distinction between "direct" and "indirect" effects upon interstate commerce, it would have furnished basis for the contention that, had defendants' business been merged with such a stream, the effects here classified as "indirect" might have been classified as "direct." But in fact the dismissal occurs in support of the proposition that defendants were not engaged in interstate commerce, and so no such conclusion can be drawn. Again the Chief Justice says that "the precise line can be drawn" between "direct" and "indirect" effects "only as the individual cases arise." What is thus suggested is that the Court looks forward to converting the distinction in question into a sort of due process clause protective of state power. But even so, there remains the question what value the court expects to assign its holding in the *Schechter Case* in the plotting of this line. Finally, while appearing to accept the Chief Justice's opinion, Justices Cardozo and Stone nevertheless dissociate themselves from it by filing a supplementary opinion.

The principal reason for favoring the more sweeping construc-

tion of the decision is furnished by the Chief Justice's emphasis upon the supposed necessity of maintaining the states in their powers over their "local concerns," especially when this is taken in connection with the fact that *the Court has always characterized production as "local."* Thus he says:

"If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control."<sup>26</sup>

And again:

"The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.

"Otherwise, as we have said, there would be virtually no limit to the Federal power, and for all practical purposes we should have a completely centralized government."

Significant, too, are his summary of the Government's defense of the National Industrial Recovery Act and his answer to this. He reduces the former to two main contentions:<sup>27</sup>

"Thus, the government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that labor represents 50 to 60 per cent of these costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work translates his saving into lower prices; that this results in demands for a cheaper grade of goods; and that the cutting of prices brings about a demoralization of the price structure. . . . The government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that,

unless similar action is taken generally, commerce will be diverted from the states adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours."

To the former contention he returns the following answer:<sup>28</sup>

"Similar conditions may be adduced in relation to other businesses. The argument of the government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a state, because of . . . their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation or cost would be a question of discretion and not of power."

And his answer to the second argument is to like effect:<sup>29</sup>

"The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the states to deal with domestic problems arising from labor conditions in their internal commerce.

"It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce



clause itself establishes, between commerce 'among the several States' and the internal concerns of the state. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act—the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities."

Giving this language its proper weight, it appears to boil down to the proposition that *any effect which may reach "commerce among the several States" from conditions surrounding production must be deemed "indirect" and per se beyond the corrective power of the national government under the commerce clause.* And by the same token, it seems allowable to generalize the Court's further holding that defendants' practices in connection with their local sales had only an "indirect" effect upon interstate commerce and so were beyond national power.

Once again, however, it is necessary to note that in lending assent to language of such indefinite scope the Court ignored the requirements of the litigation before it. The Schechters were not engaged in "industry generally throughout the country"; they were engaged in production or manufacture only to the extent of dressing poultry for the local market. Their primary business was that of supplying retailers with poultry; that is, making what the Court holds to be "local sales." So, had the case been decided simply on the basis of the commerce clause, it would not have been necessary for the Court to use the sweeping expressions just quoted.

Nor is it without interest to point out that at this same sitting the Court, in deciding the *Rathbun Case*,<sup>30</sup> was compelled to disavow much of its ambitious opinion in the *Myers Case* of 1926<sup>31</sup> regarding the president's removal power. This it did by quoting Chief Justice Marshall's statement in *Cohens v. Virginia*, "that general expressions, in every opinion, are to be taken in connec-

tion with the case in which those expressions are used."<sup>32</sup> It is not difficult to imagine the Chief Justice's opinion in the *Poultry Case* being subjected at some future time to the same sort of deflation.

## II

What is to be said of this decision from the point of view of constitutional law? More definitely, what is to be said regarding the soundness of the "principle" by which the Chief Justice's opinion for the Court endeavors to articulate it to the established structure of constitutional law as shown in previous cases? This "principle" is, as we have seen, that "there is a necessary and well-established distinction between direct and indirect effects" on interstate commerce arising from intrastate activities, and that Congress's power extends *only* to the former. First, is this "principle," as here applied, soundly grounded in the cases? Secondly, is there available from the cases an alternative principle which affords a more workable test of national power in relation to the actual organization of business today? To these questions we now address ourselves.

What we confront in the distinction between "direct" and "indirect" effects is, very evidently, a *formula*, a *verbal device*, such as constitutional law—indeed, all judge-made law—abounds in. Whence came this formula; what had been its judicial history prior to the *Schechter Case*? The former of these queries may be answered with complete assurance: the formula in question was *first* enunciated by the Court in a field of constitutional law different from, though adjoining, that in which we now face it, and as a test not of *national* but of *state* legislative power in relation to the commerce clause. Its purpose was to supply a category for those acts which a state *might not* constitutionally pass, even in the absence of Congressional legislation, because of their "direct"

effect upon "commerce among the several States," and likewise a category for those acts which, in the similar absence of Congressional legislation, a state *might* constitutionally pass although such acts affected "commerce among the several States" "incidentally" or "indirectly."

Nor do we have to search far for the law and doctrine bearing on this phase of our inquiry, for by a fortunate coincidence this was brought together by the Chief Justice (then Justice Hughes) more than twenty years ago in his famous opinion in the *Minnesota Rate Cases*.<sup>33</sup> From discussing a long line of cases illustrative of the doctrine that "the States cannot under any guise impose direct burdens upon interstate commerce," Justice Hughes next proceeds to point out that "there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. . . ." The opinion then continues:<sup>34</sup>

" . . . it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that

which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

This passage is extracted from a discussion which extends through several pages and in which are cited many cases from the period of Marshall down. What is shown, in brief, is that the distinction between "direct" and "indirect" effects upon interstate commerce was originally laid down by the Court in order to *liberate* the states from a too rigorous application of its other doctrine that Congress's power over interstate commerce is "exclusive," and not in order to *restrict* Congress's powers in any way whatsoever. Quite the contrary in fact, for it is the very purpose of the term "indirect" in these cases to designate effects upon interstate commerce from which, when they proceed from state legislation, relief must be found, if at all, not in the Constitution but in action by Congress. Two years later, in fact, in the *Shreveport Case*,<sup>35</sup> the Court, speaking again through Justice Hughes, found that Congress had, by the Act of 1887, provided a mode of relief from local rates which "discriminated" against interstate commerce, although such rates had been set in the first instance by a state in exercise of its admitted power to regulate its purely internal commerce.

And if "indirect" state interferences with interstate commerce may be disallowed by Congress, why are not "indirect" interferences by private persons subject to the same hazard? In the words of the Court in the *Debs Case*:<sup>36</sup>

"If a state, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?"

The question is evidently intended to answer itself.<sup>37</sup>

The distinction between "direct" and "indirect" effects upon interstate commerce was first erected into a limitation upon the national commercial power in the notorious *Sugar Trust Case* of 1895.<sup>38</sup> There a Court, dominated by the current laissez-faireism, which manifested its influence in other spheres of constitutional interpretation at the time, held that the Sherman Anti-Trust Act could not constitutionally reach a manufacturing concern which, it was admitted, controlled ninety-eight per cent of the sugar refined in the United States. To the Government's argument that production necessarily contemplated sale of the product, and in this instance its sale throughout the Union, the Court opposed the following ideology: (1) Congress's power over "commerce" in the primary sense of traffic was virtually stricken out of the Constitution, on the ground that commerce in this sense "served manufacture to fulfill its function." (2) The "commerce among the several States" which Congress is given power to regulate was confined to transportation among the states, and this power was held not to operate until goods actually started from one state to another. (3) In relation to "commerce among the several States" *as thus conceived*, the effect of a manufacturing monopoly was held to be "indirect" and beyond Congressional power.

Said Chief Justice Fuller for the Court:

"Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, *but the restraint would be an indirect result, however inevitable, and whatever its extent*, and such result would not necessarily determine the object of the contract, combination, or conspiracy. . . . Slight reflection will show that, if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."<sup>39</sup>

"Indirect result, *however inevitable and whatever its extent*"—thus the Court describes private interferences with "commerce among the several States," which Congress is helpless to prevent or control because otherwise the states would *in theory* be left with little control over that which *in fact* they cannot effectively control at all! But in what sense can a result "*however inevitable and whatever its extent*" be termed "*indirect*"? The answer is to be found, as above indicated, in the Court's mental image of the interstate commerce process as *merely a physical movement* of goods from one state to another. Upon "commerce" thus narrowly conceived, the impact of conditions attending manufacture and production may very well be termed "indirect," since it would be felt *first* by "commerce" in the primary sense of *buying and selling*, a function, by hypothesis, of manufacture and production. And it is on the same quaint model that the Court's decision in the *Poultry Case* was built in the year of grace 1935! The model itself hails in the first instance from the famous *Log Case*<sup>40</sup> of fifty years ago. What our nostalgic guardians of the Constitution seem really to have reverted to is the age of logs, skids, and oxen!

But the thing that perhaps more than anything else makes this sudden revival of the *Sugar Trust Case* astonishing is that its authority had been long since largely discredited on the matter concerning which it was originally pronounced; namely, the interpretation and application of the Sherman Act. Precisely a decade later, almost to the day, the Court handed down its decision in *Swift & Co. v. United States*,<sup>41</sup> which sets up an entirely new point of departure in this field of the Court's jurisprudence. In the language of Chief Justice Taft, speaking for the Court in 1923:<sup>42</sup>

"That case [the *Swift Case*] was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce

where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such. The Swift Case merely fitted the commerce clause to the real and practical essence of modern business growth."

This was said in *Chicago Board of Trade v. Olsen*, in which the Court sustained the power of Congress to regulate sales of grain for future delivery. The basis of the decision is succinctly stated in the headnotes of the case as follows:<sup>43</sup>

"Congress having reasonably found that sales of grain for future delivery (most of which transactions do not result in actual delivery but are settled by off-setting with like contracts), are susceptible to speculation, manipulation and control, affecting cash prices and consignments of grain in such wise as to cause a direct burden on and interference with interstate commerce therein, rendering regulation imperative for the protection of such commerce and the national public interest therein,—had power to provide in the Grain Futures Act . . . for placing grain boards of trade under federal supervision and regulation . . . as a condition to dealing by their members in contracts for *future delivery*."

Of foremost importance here for our present discussion, naturally, is the conception of "commerce" which is involved. This is clearly envisaged as comprising primarily *dealing, trading, business*. Such dealing is accompanied, to be sure, in its interstate phases, by actual movements of commodities, which, as it were, authenticate its essentially interstate character. Physical obstruction, however, to a physical movement of goods is far in the background of the Court's mind, if indeed it is thought of. The act before it is sustained as being designed to protect a *business* against the "obstruction" which results from the effect of certain practices in that business upon the *price* of the commodity dealt in.

Speaking on this last point, Chief Justice Taft says:<sup>44</sup>

"The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain, that it recurs and is a constantly possible danger."

But it may be objected that even in the *Olsen Case* the Court uses the term "direct" to characterize the effects upon interstate commerce which the act there sustained reaches. This is true: but the answer is twofold. In the first place, the *commerce* with reference to which such effects are termed "direct" is commerce in the sense of *trade, traffic, business*, whereas the commerce which by the *Sugar Trust Case* Congress was entitled to protect from "direct" effects was *transportation* only. In the second place—and what is more important—the Court's designation of the effects reached by the Grain Futures Act as "direct" was based primarily on a finding of Congress itself that such was their nature. To quote again from Chief Justice Taft's opinion, which in turn quotes from his earlier opinion in *Stafford v. Wallace*:<sup>45</sup>

"Whatever amounts to a more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. *This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.*"<sup>46</sup>

It is apparent that the distinction between "direct" and "indirect" effects upon interstate commerce is employed in the *Sugar*



*Trust and Poultry Cases*, on the one hand, and in *Chicago Board of Trade v. Olsen*, on the other hand, in two very different senses. In the former cases the distinction is treated as embodying an absolute principle dividing the field of the national commercial power from a field of inviolable state sovereignty, or something closely akin to such a principle. In the *Olsen Case*, as in *Stafford v. Wallace*, the distinction is treated as *one of fact*, and hence as one to be applied *in the light of fact*. The question is, Does a particular business practice, carried on locally and so falling indubitably within the normal jurisdiction of the state, nevertheless affect interstate commerce "*unduly*"? If so, then Congress may regulate it to the extent of eliminating this effect; and the question is primarily one for Congress itself to determine, nor will the Court disturb Congress's determinations of this question unless they are clearly contrary to fact. This, it is submitted, is the doctrine of the *Olsen Case* so far as the distinction between "direct" and "indirect" effects is concerned.

So, I repeat, the Court's application here of the distinction between "direct" and "indirect" effects upon interstate commerce represents an attempt to revive a precedent forty years old, and one which subsequent adjudication had almost completely discredited. But this miraculous evocation of the one-time dead is not made by name. The only cases which the Chief Justice *cites* in direct support of his pivotal principle are cases in which the Sherman Act was invoked against labor combinations. As to them, the opinion reads:<sup>49</sup>

"The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. . . . But, where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect

effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes."<sup>48</sup>

But may these cases legitimately be appealed to in the present instance? In the Chief Justice's own words, they "related to the application of the Federal statute and not to its constitutional validity." Are the two questions so closely identical as he seems to assume? On first consideration certainly, there appears to be little warrant for making a requirement of proof of a defendant's *intention* to violate a statute the test and measure of the *power* of Congress to enact such a statute. To put the matter otherwise, a court might well hesitate to impute to a defendant the *intent* to "restrain" commerce by doing a certain act, without its following that Congress could not prohibit such act as a restraint upon commerce. *Nor is Congress's power to regulate commerce solely a power to prevent restraints upon it.* Congress may itself restrain commerce for the general good.

And it is at this point that Justice Cardozo's supplementary opinion becomes of interest. The following passage from it is the pertinent one:<sup>49</sup>

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the centre. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size. . . .'<sup>[50]</sup>

"The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. . . . There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it al-

most everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."

Yet even this language represents, it seems to me, a considerable departure from the doctrine of the *Olsen Case*, though that case is cited in support of it. The conventional gesture of deference to the finding of fact which the enactment of a statute is presumed to imply is omitted, and this despite the emphasis of the government's argument in the *Poultry Case* upon factual data. And is it sufficient to say that a certain "view of causation . . . would obliterate the distinction between what is national and what is local in the activities of commerce" without further effort to meet the contention that this distinction no longer corresponds with the actual conduct of "the activities of commerce" in this country? In a word, the conceptualism, the determination to resist the inrush of fact with the besom of formula, which pervades the Chief Justice's opinion for the Court, is not altogether absent from Justice Cardozo's opinion, though the difference may be sufficient to admit in time an opening wedge against this decision.

We now turn to the more fundamental aspect of the Chief Justice's opinion.

### III

The distinction between "direct" and "indirect" effects upon interstate commerce was characterized on an earlier page of this article as a "*device*," and further scrutiny of the Chief Justice's opinion justifies the appellation. The distinction is, it is true, professed as one which is well grounded in previous cases, and hence as part and parcel of the accepted body of American constitutional law whereby the Court is obligated when it does not choose to cast aside the shackles of *stare decisis*. This contention we have just concluded examining. But underlying this argu-

ment for the distinction in question is another; namely, that its maintenance as a limitation upon Congress's powers over interstate commerce is essential unless the states are to lose control over their "internal concerns." In other words, the distinction, valid in itself, is further validated as being the logical outgrowth and indispensable instrument of an underlying purpose of the Constitution.

To quote again a passage from the opinion which was given earlier:<sup>22</sup>

" . . . the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government."

What these words of the Chief Justice set forth is a problem much less of constitutional *law* than of constitutional *theory*. It is a problem, that is to say, that grows out of the idea that the Constitution overlays certain fundamental values and certain antecedent institutions, the maintenance of which must always afford a prior claim upon the consciences of its official expositors and must always condition their manipulation of its terms. The Chief Justice does, to be sure, cite the commerce clause itself as recognizing in "the internal concerns of the state" a limit to the power of Congress over "commerce among the several States," but the claim would be difficult to sustain on the basis of the commerce clause alone. The Chief Justice's case for his contention has to be sought farther afield.

Writing in *Federalist*, page 39, Madison contended that, when considered "in relation to the extent of its powers," the government proposed by the Constitution could not "be deemed a

*national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a *residuary and inviolable sovereignty* over all other objects."<sup>52</sup> He then continued:

"It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, . . . is a position not likely to be combatted."<sup>53</sup>

Here then is the original fountainhead of the doctrine of the *Schechter Case*. Two ideas appear quite clearly: (1) that the states retain under the Constitution an "inviolable sovereignty"; (2) that it is the duty of the Supreme Court to protect this sovereignty against invasion by the national government. And from these ideas ensues a third, that the Court must not construe any of the powers of the national government in such a way as to project them into the "inviolable sovereignty" of the states. In other words, *this "inviolable sovereignty" comprises of itself a limitation upon the powers of the national government*. A fourth idea is less clear, but seems, nonetheless, to be implied; to wit, that the "inviolable sovereignty" of the states is coextensive with their "residuary" powers—in other words, with those powers which the states still retain under the Constitution.

It is worthy of note that this doctrine of Madison's was formulated before the Tenth Amendment was added to the Constitution. Does, then, the Tenth Amendment make the "reserved powers of the States" a limitation on national power? The words

of the Amendment are as follows: "The powers not delegated by this Constitution to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the People." It is difficult to see how these words can be construed into recognition of an "inviolable sovereignty" of the states. They clearly recognize the character of the national government as one of delegated powers; but they imply logically that definition of the reserved powers of the states must wait upon the prior definition of national power. What is more, the Tenth Amendment is only *one* provision of the Constitution bearing on the relation of national to state power.

When the first twelve amendments, of which ten were eventually ratified, were offered to the Constitution, it was generally understood that their purpose was to clarify rather than to alter the Constitution, then so recently adopted. A part of this Constitution, however, was the "supremacy" clause, which reads as follows: "This Constitution and the Laws of the United States which are made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." Here again, as in the Tenth Amendment, it is recognized that not all the powers of government have been delegated to the national government, but that certain powers are still retained by the states. It is also foreseen—no inordinate act of prevision surely—that the states would at times use their conceded powers in a way to conflict with the exercise by the national government of its conceded powers, and the unqualified provision is made that in all such cases the laws of the national government shall prevail.<sup>54</sup>

What is more, for nearly a half century following its adoption the Court's construction of the Constitution hewed strictly to the

clear line demarked by this language, and afforded no inkling of a suggestion that the Tenth Amendment derogated in any way from its literal force and effect. For present purposes it is sufficient to consider in this connection Marshall's opinion in *Gibbons v. Ogden*,<sup>55</sup> where the commerce clause was construed by the Court for the first time.

Here a monopoly which the state of New York had conferred upon certain persons to navigate steamboats upon the waters of that state was held to be void because conflicting with an act of Congress which conferred the right to engage in the coasting trade upon vessels licensed under the act. "Commerce" was broadly defined to comprise all "commercial intercourse," and hence navigation as well as traffic, while "commerce among the several States" was described as that commerce which "concerns more States than one." And the power of Congress to "regulate" such commerce was the power to *govern* it. This power penetrated state lines at will, and was vested in Congress "as absolutely as it would be in a single government." The only matters it did not reach were those "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government," and the sole restraint upon its exercise was, as in the case of declaring war, the responsibility of Congress to its constituents.<sup>56</sup>

At the same time, Marshall also described the reserved powers of the states in sweeping language. Referring to inspection laws, he said:<sup>57</sup>

"They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal com-

merce of a state, and those which respect turnpike-roads, ferries, etc., are component parts of this mass."

The opinion then continues:<sup>58</sup>

"No direct general power over these objects is granted to Congress; and consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. . . . In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere."

Proceeding from this basis, Marshall freely conceded the argument made for Ogden that New York might have created the monopoly, which Gibbons was contesting, by virtue of its power to regulate its "domestic trade and police." But that fact, he promptly added, did not suffice to save the monopoly, since it conflicted with a constitutional act of Congress regulatory of "commerce among the several States."<sup>59</sup> His language at this point bears so directly on the problem immediately before us that it should be quoted at length:<sup>60</sup>

"In argument . . . it has been contended that if a law, passed by a state in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers. But [he answers] the framers of the constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of



itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is [the] supreme [law]; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

It is evident, therefore, that so far as the decision in the *Schechter Case* turns upon the idea that "the internal concerns of the state" comprise matters which Congress may not reach by legislation otherwise within its power to enact, it receives no support either from the literal reading of the supremacy clause, nor yet from Chief Justice Marshall's application of that clause. Not less evident is it that such an idea, pursued to its logical consequences, must, in view of the indefinite scope of "the internal concerns of the state," have stifled national power in its very cradle. The fact is that the idea in question has received from the Court *only the most intermittent recognition and enforcement*.

Two years after Marshall's death, Madison's doctrine became the doctrine of the Court in the case of *City of New York v. Miln*.<sup>61</sup> The question at issue was the validity of a New York statute laying certain requirements upon masters of vessels arriving in the port of New York with passengers aboard. The Court found that there was no collision between this act and the relevant act of Congress. It then proceeded, however:<sup>62</sup>

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited juris-

diction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

Justice Story presented a dissenting opinion. "I admit," said he, "in the most unhesitating manner, that the states have a right to pass health laws and quarantine laws, and other police laws, not contravening the laws of congress rightfully passed under their constitutional authority. . . . It was said by this Court in the case of *Brown v. The State of Maryland* . . . that even the acknowledged power of taxation by a state, cannot be so exercised as to interfere with any regulation of commerce by congress." And he later added this interesting bit of evidence:

"In this opinion I have the consolation to know that I had the entire concurrence, . . . of that great constitutional jurist, the late Mr. Chief Justice Marshall. Having heard the former arguments, his deliberate opinion was, that the act of New York was unconstitutional; and that the present case fell directly within the principles established in the case of *Gibbons v. Ogden*, . . . and *Brown v. The State of Maryland*. . . ."<sup>63</sup>

The Court's opinion in the *Miln Case*, it seems clear, adopts the theory that the power of the state over its *purely internal affairs* lies outside the operation of the principle of national su-

premacv and hence comprises an independent limitation upon national power. Later *dicta* of individual justices from this time on till after the Civil War assert the same principle, or close approximations thereto. The underlying thought is that voiced as late as 1898 by Judge Cooley in his *General Principles of Constitutional Law*, in the following words: "In strictness there can be no such thing as a conflict between state and nation. The laws of both operate within the same territory, but if in any particular case their provisions are in conflict, one or the other is void." And to the same effect is the following passage from Professor McLaughlin's *A Constitutional History of the United States*, which was published only a few months prior to the decision in the *Schechter Case*: "Neither government was to be inferior to the other or in ordinary operation to come into contact with the other."<sup>64</sup> In other words, the supremacy clause is really nugatory except as asserting the supremacy of the Constitution itself; for when the powers of the two governments are properly construed in relation to each other they meet each other as equal, opposing powers—a view which was directly combated by Marshall in *Gibbons v. Ogden*, as we saw above.

But to what extent has this doctrine actually influenced judicial definition of the national legislative power? One notable achievement must be conceded it at once—it lies at the basis of the doctrine of the constitutional exemption of "state instrumentalities" from national taxation. This was first established in *Collector v. Day*,<sup>65</sup> decided in 1870, regarding the official income of a state judge. The following language from Justice Nelson's opinion for the Court is directly on the point in which we are here interested:

"The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme;

but the States within the limits of their powers not granted, or, in the language of the tenth Amendment, 'reserved', are as independent of the General Government as that government within its sphere is independent of the States. . . .

"The supremacy of the General Government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality. . . .

"We do not say the mere circumstance of the establishment of the Judicial Department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the General Government from levying the tax, as that depends upon the express power to lay and collect taxes but it shows that it is an original inherent power never parted with, and in respect to which the supremacy of that government does not exist, and is of no importance in determining the question. . . ."<sup>65</sup>

Other cases in which the Court has treated the "reserved" powers of the states as a limiting principle in the definition of national power have been few and unimportant *until recent years*. No one would today, I presume, challenge Chief Justice Marshall's assertion that "In war we are one people. In making peace we are one people."<sup>67</sup> Nor would any one be apt, in view of *Missouri v. Holland*,<sup>68</sup> to place great reliance upon—to employ Justice Holmes's depreciatory language in that case—"some invisible radiation from the general terms of the Tenth Amendment"<sup>69</sup> as setting a limit to the treaty-making power. Nor would any one since the recent case of *University of Illinois v. United States*,<sup>70</sup> be able to appeal with much confidence to the "reserved" powers of the states as against a national regulation of foreign commerce. Petitioner in that case, a state institution, relying upon *Collector v. Day* and supporting precedents, challenged the right of the national government to collect a customs duty

upon some scientific apparatus imported from abroad. The Court, speaking through Chief Justice Hughes, unanimously denied the petition.

"It is," said the Chief Justice, "an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action. . . . The principle invoked by the petitioner, of the immunity of state instrumentalities from federal taxation, has its inherent limitations. . . . In international relations and with respect to foreign intercourse, the people of the United States act through a single government with unified and adequate national power."<sup>71</sup>

It is in the field of the interstate commerce power that the most persistent effort has been made to set up, on one basis or another, state power as a limitation on national power. Let us review briefly some of the *verbal devices* or *formulas* which have been proposed to this end.

1. Writing in 1829, Madison asserted that, although conferred in the same words as those giving the power over foreign commerce, Congress's power over "commerce among the several States" "was intended as a negative and preventive provision against injustice among the States themselves, rather than a power to be used for the positive purposes of the general government, in which, alone, however, the remedial power could be lodged."<sup>72</sup> In other words, while "the general government" could prevent the states from regulating interstate commerce, it could not regulate that commerce itself—the very quintessence of *laissez-faireism*, certainly. Five years earlier Chief Justice Marshall had characterized Congress's power over the right to engage in interstate and foreign commerce as "absolute," while Justice Johnson, in his concurring opinion had asserted it to be "the power to regulate commerce which previously existed in the

States," which was power "to limit and restrain it at pleasure."<sup>73</sup> The Madisonian doctrine naturally commended itself to the defenders of slavery, who feared a Congressional ban upon the interstate slave trade; but when proffered to the Court many years later by counsel who were attacking the Sherman Act, Justice Peckham, speaking for the Court, dismissed it with little ceremony. "The reasons," said he, "which may have caused the framers of the Constitution to repose the power to regulate interstate commerce . . . do not, however, affect or limit the power itself."<sup>74</sup> Indeed, the history of Congressional legislation since 1887 offers monumental proof that no doctrine of *such scope* has ever succeeded in establishing itself as a barrier to the national commercial power.

2. A second suggested *device* for limiting the national power over interstate commerce is a modification of the above. It comprises the theory that, while by no means an entirely negative power, yet the power of Congress to regulate "commerce among the several States" is considerably less extensive than its power to regulate foreign commerce. Indeed, the latter power is conceded to be "plenary," being a phase of the national government's "plenary" authority in the field of foreign relations. Furthermore, it acts *externally* and so, it is contended, does not come into collision with the power of the states over their *internal* concerns. The interstate commerce power, on the other hand, always acts *vis à vis* the power of the states over their internal concerns, and hence must be curbed if this power is not to be overridden.

But the truth is that Congressional regulation of foreign commerce *can* and frequently *does* interfere with the internal concerns of a state. Among such internal concerns, by the *Child Labor*, the *Sugar Trust*, and the *Poultry Cases*, are manufactures, upon which the effect of the protective tariff is notorious. And a further illustration is suggested by the *Miln Case*, discussed

above. Here the power which the Court had most sharply in mind to safeguard against invasion by the national power over foreign commerce was the power of the state to protect itself against the introduction into its midst of undesirables from abroad, a protective function which ruling cases today attribute to the national government exclusively.<sup>75</sup> Moreover, it is only within recent years that the Court has voiced acceptance of the notion that Congress's power over foreign commerce is less extensive than its power over interstate commerce. Indeed, the idea has been repudiated in controlling opinions of the Court again and again, and may even today, perhaps, be set down as a whimsey of that arch-exponent of dual federalism, Chief Justice White.<sup>76</sup> It is true that in the recent case of *University of Illinois v. United States*, which was just referred to, we find Chief Justice Hughes asserting that "the principle of duality in our system of government does not touch the authority of Congress in the regulation of foreign commerce,"<sup>77</sup> which is perhaps meant to imply that it does touch Congress's power over interstate commerce. But inference is not decision and the point was not involved in the case.

3. The idea was also early suggested that the power to *regulate* commerce presupposes the continuance of the thing to be regulated, and hence is not the power to *prohibit* it. It was on this ground, in fact, that the constitutionality of Jefferson's Embargo, which was a sweeping, though temporary, prohibition upon foreign commerce, was challenged. Again we may say that no doctrine of *such scope* has ever secured footing either in national legislative policy or in judicial decision. Even in the case of *Hammer v. Dagenhart*,<sup>78</sup> to which we shall give further attention in a moment, the Court admits that there are cases in which regulation may properly take the form of prohibition, while, as Justice Holmes there points out in his dissenting opinion, any regulation

whatsoever of commerce necessarily infers a power to prohibit it, it being the very nature of regulation to lay down terms on which the activity regulated will be permitted and for noncompliance with which it will not be permitted.<sup>79</sup>

4. A highly important *device*—especially since the decision in *Hammer v. Dagenhart* in 1918—for converting state power into a restrictive principle on the national commercial power is the theory that this power is a subtraction which was made in 1789 from the total powers of government *for the sole purpose of promoting the commercial interests of the country*. From this it follows that while Congress may in “proper cases” prohibit commerce among the states, the said proper cases are confined to those in which the prohibition of a *branch* of such commerce will work to the benefit of such commerce when considered as a *whole*.

5. And along with this theory goes the converse doctrine or *device*, that all the other concerns of good government, the public health, safety, morals, social justice, and the general welfare (*except commercial welfare*), are reserved to the states exclusively, constituting indeed the field of the so-called “police power.”<sup>80</sup>

The difficulty in the way of squaring this twofold formula with the Preamble to the Constitution is obvious at a glance. For while the Preamble is not, strictly speaking, a part of the Constitution, and so is not a grant of power, still it states, and in the language of the framers themselves, the objectives of the Constitution, and hence, presumably, the objectives of the powers created by it, in terms which are broadly descriptive of *all* the purposes of good government the world over. Nor did this theory meet with judicial acceptance when it was originally advanced, in 1808, against the Jeffersonian Embargo. Said Judge Davis, of the Massachusetts District Court, on that occasion: “... the power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending



to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest."<sup>82</sup> Citing then the clause of Article I, Section 9 of the Constitution, interdicting a ban on the African slave trade until 1808, the Judge continued: those who framed the Constitution perceived that "... under the power of regulating commerce, Congress would be authorized to abridge it, in favor of the great principles of humanity and justice."<sup>83</sup>

Nearly a hundred years later the Supreme Court was proffered the same theory in the famous *Lottery Case* of 1903,<sup>83</sup> but rejected it, sustaining the power of Congress to prohibit the transportation of lottery tickets from one state to another on broad grounds of national welfare as well as of commercial benefit. Nor did the proponents of the theory make better headway with it in their attack ten years later on the "White Slave" Act of 1910. Said Justice McKenna, speaking for the Court:<sup>84</sup>

"Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, . . . but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."

Nevertheless, five years later the Court held void an act forbidding the transportation of child-made goods from one state to another, as being *not* a regulation of commerce but an interference with the powers reserved to the states.<sup>85</sup> And why was not this prohibition a regulation of commerce? The answer is given by Chief Justice Taft in his opinion in the second *Child Labor Case* in the following words: "... when Congress threatened to stop interstate commerce in ordinary and necessary commodities, *unobjectionable as subjects of transportation*, and to deny the

same to the people of a state in order to coerce them into compliance with Congress's regulation of state concerns, the Court said that this was not in fact regulation of interstate commerce, but rather that of state concerns and was invalid.<sup>86</sup> In other words, since the goods produced by child labor were not harmful to interstate *transportation*—the primary significance of commerce as *traffic* is ignored—Congress had no legitimate concern with the matter; it is only the local police power that may deal with child labor.

Two other suggestions for preventing invasion by the national commercial power of the accustomed field of state legislation may be disposed of more briefly:

6. Following the decision in *Hammer v. Dagenhart* the Court was offered the argument that even when Congress was otherwise entitled to prohibit transportation of an article of commerce, it might do so only in aid of the state police power; but the Court rejected the suggestion in the following words:<sup>87</sup>

"Congress may exercise this authority [over interstate commerce] in aid of the policy of the state, if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the states may induce legislation without reference to the particular policy or law of any given state. . . . The control of Congress over interstate commerce is not to be limited by state laws."

7. The other *device* just alluded to is really a complexus of devices, which comprises the ideology derived from the *Log Case*,<sup>88</sup> that commerce is primarily *transportation*; that Congress's power over transportation between states does not begin until the last stage of the journey begins; and that, therefore, Congress may not validly give any attention to what takes place prior to such movement of goods or persons. This *device* undoubtedly lent important support to the decision in *Hammer v. Dagenhart*. It is, however, contradicted by both earlier and later

cases in which state laws were invalidated on the ground that they interfered with interstate commerce in the sense of *dealing or traffic*,<sup>89</sup> and it is also contradicted by the Court's later decision in *Brooks v. United States*,<sup>90</sup> upholding the Federal Motor Theft Act of 1919, the major purpose of which is acknowledged by the Court to be protection to owners of motor vehicles, that is to say, to interests in the state of the origin of the act of transportation which is penalized. Nor is it necessary to mention the line of decisions, culminating in the *Olsen Case*, which also involve "commerce" in the primary sense of *traffic*.

Returning now to the Court's opinion in the *Schechter Case*, we note its tacit avoidance of all the above *devices*. It will be pertinent to refer in this connection briefly to (4), (5), and (7). The last was not invoked for the obvious reason that the offenses for which the *Schechters* were being prosecuted occurred, according to the Court's holding, not prior to an act of interstate transportation, or commerce, but after such act was completed. *Devices* (4) and (5) were not invoked for the reason that, in the Government's argument in behalf of the National Industrial Recovery Act, the measure was justified not on the *humanitarian* grounds which sufficed to condemn the Child Labor Act, but on the ground that its controlling purpose was *the restoration of interstate commerce*, which the act aimed to bring about by increasing the national purchasing power. And not finding these devices available to its purpose, the Court fell back upon the *Sugar Trust Case*, from which it extracted the distinction between "direct" and "indirect" effects upon interstate commerce—*device* number (8).

#### IV

The Chief Justice's opinion in the *Schechter Case* represents an effort once more to fan into effective flame the dying embers of

the Madisonian conception of an inviolable "state sovereignty," incapable of penetration by national power, and hence constituting an independent barrier in delimitation of that power. Is such an effort likely to prove of enduring value in determining what powers the national government should exercise in the presence of modern conditions, especially in the presence of the national organization of commercial activities? This question could no doubt be more advantageously answered if we knew just what content the *Schechter* holding assigned the conception. But even according the term the most modest connotation permitted by any allowable interpretation of the holding, its workability in modern conditions is still open to challenge.

Let us in this connection consult once again Justice Hughes's famous opinion in the *Minnesota Rate Cases*. There was foreshadowed the proposition, which two years later became the basis of the Court's decision in the *Shreveport Case*, that Congress's power in the regulation of interstate railway rates was paramount to the states' uncontroverted power to regulate local rates, and capable, therefore, of curtailng and overriding the latter to any extent necessary to render effective the former. In support of this conclusion Justice Hughes offered the following highly concrete picture of the actual relationship at that date of the conduct of interstate transportation with that of local transportation:<sup>91</sup>

"The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right of way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year, and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made today, which will hold tomorrow; that terminals, facilities, and connections in one state aid the carrier's entire business, and are an element of value with respect to

the whole property and the business in other states; that securities are issued against the entire line of the carrier and cannot be divided by states. . . . The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce."

Suppose, now, the Chief Justice had approached the *Schechter Case* from the point of view suggested by this realistic mode of reasoning rather than from the point of view of the dogmatic conceptualism of the *Sugar Trust Case*—what kind of opinion would he have written? At any rate, it is not difficult to imagine one that he might have written. His point of departure would have been the primary idea of "commerce" as *buying, selling, traffic*—"commercial activities," in short. He would have urged the achieved economic solidarity of the country, quoting no doubt from recent opinions of the Court the statement, "Primitive conditions have passed; business is now transacted on a national scale."<sup>99</sup> He would have pointed to our nationalized system of credit, our nationalized system of transportation, our nationalized system of distribution. He would have urged that all large-scale production has in contemplation the interstate market; that, indeed, a large percentage of carriers' loadings are of goods destined for other states. He would have noted how often it occurs that the article which reaches the consumer is the result of successive productive activities carried on in several states; that the consumer is, in other words, the *terminus ad quem* toward which sets a process neglectful of state lines and dominated by its

interstate characteristics. Quoting, then, his own words in the *Appalachian Coals Case*, decided two years since, "realities must dominate the judgment,"<sup>93</sup> he would have continued: governmental regulation of an economy which is integrated to this degree must obviously be centered in a single government, not only if it is to be effective, but if indeed it is not to be positively mischievous.<sup>94</sup> In other words, *the choice is between national regulation and no regulation*. And in connection with the latter possibility he would not have failed to remark that there is a Gresham's law of business methods as well as of currencies, that disreputable methods drive out good, and that the fittest who survive are frequently the least fit. Thus, turning to the case at hand, he would have pointed out that the defendants were charged with diverting the stream of interstate commerce in poultry toward themselves, and that this was in fact the necessary and *calculated* tendency of their acts; that by violating the law ("chiseling"), they were enabled to undersell their competitors, to increase their own sales, and hence to go into the interstate market for an increasing number of fowl. But such being the case, the Chief Justice would have queried, what becomes of the distinction between "direct" and "indirect" effects on interstate commerce? Indeed, it would have been appropriate, had he quoted at this point the following evaluation of this distinction from a recent, though dissenting opinion:<sup>95</sup>

"... the traditional test ... seems ... too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."

And his dismissal of the argument invoking in defendants' behalf the power of the states over their "internal concerns" would have

been similarly factual and curt. A diversion of interstate commerce is not an "internal concern" of the state where it occurs; it is not—in Marshall's words—one "which does not affect other States." And again quoting himself, he would have added: "Within its sphere as recognized by the Constitution, the Nation is supreme. The question is simply of the Federal power as granted, where there is authorized exercise of that power, there is no reserved power to nullify it—a principle obviously essential to our national integrity, yet continually calling for new applications."<sup>95</sup>

So much for the opinion which the Chief Justice *might* have written in the *Poultry Case*, but did not. A further question remains, which we may proceed to answer on our own account: Just how effective, in point of fact, *is* the Court's present application of the commerce clause in protecting "the internal concerns of a state"? Let us, in answer to this question, lay the actual decision in the *Poultry Case* alongside the decision three months earlier in the case of *Baldwin v. Seelig*.<sup>97</sup> Here it was held that the New York Milk Control Act, in attempting to prohibit the sale within the state of milk purchased outside it at less than stipulated prices, violated the commerce clause. Invoking "our national solidarity" Justice Cardozo, speaking for the Court, said:<sup>98</sup>

"The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

Adding together these two holdings, rendered within a few weeks of each other, their net result seems to be that neither Congress nor a state may "for economic advantage" regulate the local sale of goods brought into the state from another state: Congress

is prevented from so doing by the Court's solicitude for the *power*(1) of the states over their "internal concerns" and the states are disabled by its solicitude for Congress's *power*(1) over interstate commerce. Common sense suggests that possibly both solicitudes have been somewhat overworked. Why should not the state of New York govern local sales to the extent necessary to make its control over its "internal concerns" really effective, until Congress—the authority to which, after all, the *Constitution* gives the power to regulate "commerce among the several States"—decrees otherwise? And why should Congress's power be held to be limited by a power which no state can, alone, exercise effectively?"

To sum up: Both the grave concern expressed by the Chief Justice for the reserved powers of the states and the prominent place which this occupies in his opinion strongly suggest that the governing intention of the decision, at least in the minds of a majority of the *present* Court, is to exclude the national government from the regulation of labor conditions in the field of the productive industries. In this respect business management is still to range uncontrolled save by the states, which is to say, controlled very little if at all. But the decision, however interpreted, reveals notable weaknesses. It was not required for the determination of the case, the argumentative basis supplied it by the Chief Justice is unnecessarily broad, and the doctrine of which this basis is compounded is gravely defective. The pivotal distinction between "direct" and "indirect" effects upon interstate commerce was originally employed in a sense almost diametrically opposed to that given it in this case. The only previous decision in which it was applied in the present sense—*adversely* to national power—is one which, prior to the *Schechter Case*, had come to be regarded as having been substantially overruled by later cases. The distinc-



tion is, moreover, as thus employed, artificial in the highest degree, although, not inconceivably, it might hereafter be adapted to a more realistic type of decision. Also, this distinction is merely one of a long series of devices which have been brought forward from time to time to blunt the principle of national supremacy, but none of which the Court has ever applied with any degree of consistency.

Finally, the decision is ambiguous, albeit insufficiently so. Squinting in two directions, it inclines in the wrong direction. A more astringent opinion, or one less sympathetic toward the actual task of government, has rarely if ever issued from the Court. This is truly unfortunate. The present Court is confronted with a need as great as that which faced Marshall, and materials in rich measure wherewith to meet this need are available to it from the varied resources of our constitutional law. Surely it is to be hoped that impending decisions will reveal a spirit more constructive and generous.<sup>100</sup>

#### NOTES

<sup>1</sup> Decided May 27, 1935.

<sup>2</sup> See Professor W. L. Whittlesey in the *SURVEY-GRAPHIC*, July, 1935, at 325.

<sup>3</sup> *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 413 (1819).

<sup>4</sup> *Hurtado v. People of California*, 110 U. S. 516, 530-531, 4 Sup. Ct. 111, 118-119 (1884).

<sup>5</sup> *N. Y. Times*, June 1, 1935, at 1.

<sup>6</sup> *Id.*, July 7, 1935, § 7, at 18.

<sup>7</sup> *Id.*, July 14, 1935, § 3, at 6.

<sup>8</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 528, 55 Sup. Ct. 837, 842 (1935).

<sup>9</sup> See CORWIN, *TWILIGHT OF THE SUPREME COURT* (1934) 134-135.

<sup>10</sup> To some extent at least, the emergency concept is an outgrowth of the idea that while economic power is *normal*, a part of the order of nature, political power is *artificial* and exceptional, and is therefore justifiably applied to restrain economic power only in conditions of stress and only for the purpose of removing such conditions as speedily as possible. In other words, governmental power stands in about the same relation to economic power that the regime of martial law, as described in *Ex parte Milligan*, 71 U. S. (4 Wall.) 2 (1866), which is cited by the Chief Justice at this point, does to the regime of civil law.

<sup>22</sup> See Justice Sutherland's language in *Adkins v. Children's Hospital* (Minimum Wage Case), 261 U. S. 525, 544, 43 Sup. Ct. 394, 396 (1923): "From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law."

<sup>23</sup> *Dred Scott v. Sandford*, 60 U. S. (19 How.) 393 (1857).

<sup>24</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 543, 55 Sup. Ct. 837, 849 (1935).

<sup>25</sup> Citing *Brown v. Houston*, 114 U. S. 622, 632, 633, 5 Sup. Ct. 1091, 1096 (1885); *Public Utilities Comm. v. Landon*, 249 U. S. 236, 245, 39 Sup. Ct. 268, 269 (1919); *Ind. Assn. v. United States*, 268 U. S. 64, 78, 79, 45 Sup. Ct. 403, 406, 407 (1925); *Atl. Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 267, 48 Sup. Ct. 107, 110 (1927).

<sup>26</sup> 114 U. S. 622, 5 Sup. Ct. 1091 (1885).

<sup>27</sup> *Id.* at 633, 5 Sup. Ct. at 1096 (italics inserted). There are also expressions to the same effect, *id.* at 630, 631, 632, 634, 5 Sup. Ct. at 1095, 1096, 1097.

<sup>28</sup> See especially the cases stemming from *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592 (1887); and *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681 (1890).

<sup>29</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 544, 55 Sup. Ct. 837, 849 (1935).

<sup>30</sup> *Citing So. Ry. Co. v. United States*, 222 U. S. 20, 27, 32 Sup. Ct. 2, 4 (1911).

<sup>31</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 544, 55 Sup. Ct. 837, 849 (1935).

<sup>32</sup> *So. Ry. Co. v. United States*, 222 U. S. 20, 27, 32 Sup. Ct. 2, 4 (1911).

<sup>33</sup> *Citing Mondou v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1, 51, 32 Sup. Ct. 169, 175 (1911).

<sup>34</sup> Citing *Houston, E. & W. T. R. Co. v. United States* (The Shreveport Case), 234 U. S. 342, 351, 352, 34 Sup. Ct. 833, 836 (1914); *Railroad Comm. of Wisc. v. Chic., B. & O. R. Co.*, 257 U. S. 563, 588, 42 Sup. Ct. 232, 237 (1922).

<sup>35</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 546, 55 Sup. Ct. 837, 850 (1935) (italics inserted).

<sup>36</sup> *Id.* at 545, 55 Sup. Ct. at 850.

<sup>37</sup> *Id.* at 546.

<sup>38</sup> *Id.* at 548, 55 Sup. Ct. at 851.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Rathbun v. United States*, 295 U. S. 602, 55 Sup. Ct. 869 (1935).

<sup>42</sup> *Myers v. United States*, 272 U. S. 52, 47 Sup. Ct. 21 (1926).

<sup>43</sup> 19 U. S. (6 Wheat.) 264, 399 (1821).

<sup>44</sup> *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729 (1913).

<sup>45</sup> *Id.* at 402, 33 Sup. Ct. at 741.

<sup>46</sup> *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833 (1914).

<sup>47</sup> *In re Debs*, 158 U. S. 564, 581, 15 Sup. Ct. 900, 905 (1895).

<sup>37</sup> The passage is quoted with approval in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 230, 20 Sup. Ct. 96, 103 (1899).

<sup>38</sup> *United States v. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249 (1895).

<sup>39</sup> *Id.* at 16, 15 Sup. Ct. at 255 (italics inserted).

<sup>40</sup> *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475 (1886).

<sup>41</sup> 196 U. S. 375, 25 Sup. Ct. 276 (1905).

<sup>42</sup> *Board of Trade of Chicago v. Olsen*, 262 U. S. 1, 35, 43 Sup. Ct. 470, 476 (1923).

<sup>43</sup> *Id.* at 2 (headnote) (italics inserted).

<sup>44</sup> *Id.* at 40, 43 Sup. Ct. at 478. See also some illuminating comment on the same point in the admirable address of Assistant Attorney-General (then Assistant Secretary of Commerce) John Dickinson, at the annual banquet, June 1, 1935, of the George Washington Law Association, entitled *The Nation and the States*. Department of Commerce Release, June 1, 1935.

<sup>45</sup> 258 U. S. 495, 521, 42 Sup. Ct. 397, 403 (1922).

<sup>46</sup> *Board of Trade of Chicago v. Olsen*, 262 U. S. 1, 37, 43 Sup. Ct. 470, 477 (1923) (italics inserted).

<sup>47</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 547, 55 Sup. Ct. 837, 850 (1935).

<sup>48</sup> Citing *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 410, 411, 42 Sup. Ct. 570, 583 (1922); *United Leather Workers' Union v. Herkert*, 265 U. S. 457, 464-467, 44 Sup. Ct. 623, 624-626 (1924); *Ind. Assn. v. United States*, 268 U. S. 64, 82, 45 Sup. Ct. 403, 407 (1925); *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310, 45 Sup. Ct. 551, 556 (1925); *Levering & Garrigues v. Morrin*, 289 U. S. 103, 107, 53 Sup. Ct. 549, 550 (1933).

<sup>49</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 554, 55 Sup. Ct. 837, 853 (1935).

[50] Quoted from Judge Learned Hand's opinion in the court below.

<sup>51</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 548, 55 Sup. Ct. 837, 851 (1935).

<sup>52</sup> *THE FEDERALIST* (Lodge ed. 1888) 238 (latter italics inserted).

<sup>53</sup> *Ibid.* Yet in 1791 we find Madison using this language: "Interference with the powers of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws or even the constitution of the States." 2 *ANNALS OF CONGRESS*, c. 1891.

<sup>54</sup> Note Justice Holmes's language in *Missouri v. Holland*, 252 U. S. 416, 432, 40 Sup. Ct. 382, 383 (1920): "... as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States. To answer this question it is not enough to refer to the Tenth Amendment ... because by Article 2, Section 2, ... the power to make treaties made under the authority of the United States ... are declared the supreme law of the land." "We admit, that the Tenth Amendment to the Constitution is merely declaratory; that it was adopted *ex abundanti cautela*; and that with it, nothing more is reserved, than would have been reserved without it." Jones, of counsel for the state in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 363 (1819) Luther Martin, for the State, reiterated the concession. *Id.* at 374.

<sup>55</sup> 22 U. S. (9 Wheat.) 1 (1824).

<sup>56</sup> *Id.* at 194-197; and see further CORWIN, *op. cit. supra* note 9, at 10-15, 188.

<sup>57</sup> *Id.* at 203.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Id.* at 209-210.

<sup>60</sup> *Id.* at 210.

<sup>61</sup> 36 U. S. (11 Pet.) 102 (1837).

<sup>62</sup> *Id.* at 130 (italics inserted).

<sup>63</sup> *Id.* at 156, 161.

<sup>64</sup> McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES (1935) 194; *cf.* Marshall's words: "These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate." 19 U. S. (6 Wheat.) 264, 414 (1821).

<sup>65</sup> 78 U. S. (11 Wall.) 113 (1871).

<sup>66</sup> *Id.* at 124-127, *passim*. The exemption of state instrumentalities from non-discriminatory national taxation appears to be today in a rather precarious situation. See *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 52 Sup. Ct. 443 (1932) (a five-to-four decision).

<sup>67</sup> *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 413 (1821).

<sup>68</sup> 252 U. S. 416, 40 Sup. Ct. 382 (1920); *cf.* *Prevost v. Grenaux*, 60 U. S. (19 How.) 1 (1856); *Bell v. Vicksburg*, 64 U. S. (23 How.) 443 (1859).

<sup>69</sup> *Id.* at 434, 40 Sup. Ct. at 383.

<sup>70</sup> 289 U. S. 48, 53 Sup. Ct. 509 (1933).

<sup>71</sup> *Id.* at 56-59, 53 Sup. Ct. at 509-510, *passim*.

<sup>72</sup> 4 MADISON, LETTERS AND OTHER WRITINGS (1903) 14-15. Monroe expressed a similar view in 1822. 2 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS (1896) 161.

<sup>73</sup> *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 212, 227 (1824).

<sup>74</sup> *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228, 20 Sup. Ct. 96, 102 (1899).

<sup>75</sup> See especially, *Henderson v. Mayor of New York*, 92 U. S. 259 (1875).

<sup>76</sup> See *Thurlow v. Massachusetts*, 46 U. S. (5 How.) 504, 578 (1847); *Brown v. Houston*, 114 U. S. 622, 630, 5 Sup. Ct. 1091 (1885); *Bowman v. Chi. & N. R. Co.*, 125 U. S. 465, 482, 8 Sup. Ct. 689, 697 (1888); *Crutcher v. Kentucky*, 141 U. S. 47, 57, 11 Sup. Ct. 851, 854 (1891); *Pitts. & So. Coal Co. v. Bates*, 156 U. S. 577, 587, 15 Sup. Ct. 415, 418 (1895); *cf.* *Buttfield v. Stranahan*, 192 U. S. 470, 492, 24 Sup. Ct. 349, 353 (1904); *Atlantic Cleaners and Dyers v. United States*, 286 U. S. 427, 52 Sup. Ct. 607 (1932); *Weber v. Freed*, 239 U. S. 325, 36 Sup. Ct. 131 (1915).

<sup>77</sup> 289 U. S. 48, 57, 53 Sup. Ct. 509 (1933).

<sup>78</sup> 247 U. S. 251, 38 Sup. Ct. 529 (1918).

<sup>79</sup> *Id.* at 277-278, 38 Sup. Ct. at 533.

<sup>80</sup> On this paragraph see CORWIN, *op. cit. supra* note 9, at 19-42, *passim*; Corwin, *Congress's Power to Prohibit Commerce* (1933) 18 CORN. L. Q. 477, 481-488.

<sup>81</sup> *United States v. The William*, Fed. Cas. No. 16,700, at 621 (Mass. 1808).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321 (1903).

<sup>84</sup> *Hoke v. United States*, 227 U. S. 308, 322, 33 Sup. Ct. 281, 284 (1913).

<sup>85</sup> *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529 (1918).

<sup>86</sup> *Bailey v. Drexel Furn. Co.*, 259 U. S. 20, 39, 42 Sup. Ct. 449, 451 (1922) (italics inserted). The limitation here placed on the national taxing power, though taking the form of a definition of the word "tax," clearly represents a triumph of the Madisonian theory. It is, however, purely auxiliary to the limitation imposed in the first Child Labor Case upon Congress's power over interstate commerce and would fall with that doctrine.

<sup>87</sup> *United States v. Hill*, 248 U. S. 420, 425, 39 Sup. Ct. 143, 145 (1919).

<sup>88</sup> *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475 (1886).

<sup>89</sup> See *Dahake-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 Sup. Ct. 106 (1921); *Lenke v. Farmers' Grain Co.*, 258 U. S. 50, 42 Sup. Ct. 244 (1922).

<sup>90</sup> 267 U. S. 432, 45 Sup. Ct. 345 (1925).

<sup>91</sup> *Simpson v. Shepard*, 230 U. S. 352, 432, 33 Sup. Ct. 729, 753 (1913).

<sup>92</sup> *Farmers' L. & T. Co. v. Minnesota*, 280 U. S. 204, 211, 50 Sup. Ct. 98, 100 (1930); *Burnet v. Brooks*, 288 U. S. 378, 402, 53 Sup. Ct. 457, 464 (1933).

<sup>93</sup> *Appalachian Coals v. United States*, 288 U. S. 344, 360, 53 Sup. Ct. 471, 474 (1933).

<sup>94</sup> See the address referred to *supra* note 44.

<sup>95</sup> Justice Stone, in *Di Santo v. Pennsylvania*, 273 U. S. 34, 44, 47 Sup. Ct. 267, 271 (1927).

<sup>96</sup> Address before New York State Bar Association, Jan. 14, 1916, 39 REPORT OF N. Y. BAR ASSN. 266, 275. "If the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States 'powers not delegated to the United States by the Constitution.'" *Everard's Brewery v. Day*, 265 U. S. 545, 558, 44 Sup. Ct. 628, 631 (1924), citing *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 406 (1819) and *Lottery Case*, 188 U. S. 321, 357, 23 Sup. Ct. 321, 327 (1903).

<sup>97</sup> 294 U. S. 511, 55 Sup. Ct. 497 (1935).

<sup>98</sup> *Id.* at 523, 55 Sup. Ct. at 500.

<sup>99</sup> "If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon the subject of or prohibit such contracts. This cannot be the case." *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 231, 20 Sup. Ct. 96, 104 (1899). See also CORWIN, *op. cit. supra* note 9, at 34-35, and accompanying notes. The above evaluation of the effect of the *Seelig* and *Schechter* holdings taken together receives support from *United States v. Seven Oaks Dairy Co.*, 10 F. Supp. 995, 1004 (Mass. 1935).

<sup>100</sup> The above prognostications as to construction likely to be put by a majority of the present Court on the holding in the *Schechter* case were borne out in the decision in *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 Sup. Ct. 855 (1936), in which the *Guffey* Coal Conservation Act was set aside by a Court splitting three ways.

## PUBLIC UTILITIES—PROGRESSION OR RETROGRESSION?

WILLIAM M. WHERRY

A LAWYER can approach the problem of the progress of law only pragmatically. He must leave teleology and metaphysical definitions to the professor. Many a time when he makes a survey he feels there has been retrogression rather than progression. Conceive, for example, a lawyer seeking for evidences of progress in Australia during the early years of its history, when there was no private property and the entire life of the colony was ordered by a benevolent despot. It would have seemed to him impossible that out of the dreadful conditions which then obtained there would in time evolve a civilization with so many admirable features. Similarly, one devoted to the administration of justice would be utterly disheartened today in Germany, where free speech is suppressed and where there apparently are no impartial disinterested tribunals to which the individual can appeal from the imbecilities and cruelties of despotism. In the same way, an American lawyer specializing in the field of public utilities is greatly discouraged by the immediate outlook. He is forced to maintain clearly in mind those ideals by which he measures progress and to make a survey of at least a hundred years in order to find any reason for encouragement.

In his pursuit of the Hegelian ideal of "the reconciliation of individual freedom and the play of social and cultural interests," he has two needs: first, a tribunal where conflicts are resolved, on principle, by reason rather than coercion; and, second, devices for developing and applying principles of prevention rather than of cure or penalty. How have these needs been met in the field of public utilities?

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One hundred years ago the only utilities were bridges, ferries, canals, and turnpikes. There were no electric power and light companies, no gas companies, no companies for developing water supplies and distributing them. The telephone was undreamed of. The steamship was just coming into use. A single experiment in the operation of a steam railroad had been made. The boldest imagination could not conceive the practical possibility of the airplane, radio, or gasoline motor-driven engine. The separation of the right to manage property and the enjoyment of its usufruct was in its simplest form. The flexible contract was unthought of. Few practised preventive law, and administrative law was in its infancy.

Nevertheless, one cannot understand the fundamental problems involved in the relation of public utilities to the law without going back to those early days, because it is not a question of the instruments and tools of civilization, but of principles, and one cannot understand the problems now confronting us or appreciate the significance of the struggle in which we are all at present engaged or appraise even faintly the possibilities of future development without contemplating the struggles of at least a hundred years ago.

## I

It was approximately one hundred years ago that the first case involving the commerce clause of the Constitution came before the Supreme Court of the United States, and it was only recently that the same court handed down its latest decision involving that clause. Yet both of these decisions were based on the same fundamental principles which had their origin in a struggle for freedom and going back three hundred years to the time of the great Coke, when that doughty champion of human rights successfully led the struggle to establish the proposition that no gov-

ernment official is above the law. This principle is essential and basic. If it be disregarded, we must believe that the inexorable march of human affairs will overthrow all acts, whether legislative, executive, or judicial, which would result in reëstablishing tyranny.

When *Gibbons v. Ogden*<sup>1</sup> arose in 1824, it did not seem unreasonably presumptuous to attempt to fix by contract terms to govern the unlimited future. The ownership of property carried with it the right to enjoy it so long as such enjoyment did not injure others. The granting of monopolies was not uncommon, and it was a commonplace of thought that the act of a legislature rested solely upon external authority and might be dictated by caprice.

It will be recalled that that case grew out of the attempt made by New York to establish a steamboat monopoly in the waters constituting the harbor of New York and in the Hudson River as far as Albany. When the steamboat was invented by Fitch, Robert Fulton, who made the first successful demonstration of its potentialities, and Chancellor Livingston combined forces to secure a monopoly that would reap the greatest financial rewards from those potentialities. They secured various statutes from the state of New York giving them the exclusive power to navigate the waters of the Hudson as far as Albany, with vessels driven by steam, at a speed of four miles an hour or greater, and requiring that any one else who wanted to operate such a craft could do so only upon securing a license from them. A similar monopoly was granted by other states.

New Jersey was the first state to retaliate by attempting to close its ports to New York commerce, and this was followed by Massachusetts and other states. The New York courts sustained the legislation supporting the monopoly in several decisions, in one of which the opinion was written by Chancellor Kent. It was this



case which finally came before the Supreme Court of the United States, to test, for the first time, the meaning of the commerce clause in the Constitution and the relative powers of the state and federal government with respect to regulation of the "natural right to free navigation."

It is interesting to observe to what extremes the states had gone in asserting their right to regulate commerce. There was no recognition on the part of the legislature of any "natural right to free navigation." New York declared that any steam vessel that entered its waters without a license from Livingston and Fulton's monopoly was to be seized and forfeited to those monopolists. Thus the state asserted, in the most practical manner possible, that its power to regulate was the power to confiscate and destroy. The states of New Jersey and Massachusetts, by their acts closing their ports to New York, were equally emphatic. There was no attempt to secure compliance with the law by moral sanctions or by the exercise of the persuasive power of reasoning. The compliance was to be accomplished purely by coercion—the threat of confiscation and destruction. This is an illustration of how archaic conceptions of morality survive in government, which is, of course, the reason why a governmental tyranny is so much more oppressive than any other. The State, from its highest to its meanest official, can do no wrong. Long after the private war has been abolished and the duel universally condemned, the sovereign still resorts to international war as its final sanction. At a time when every decent man recognizes the obligation to discharge a debt of honor, the sovereign repudiates its solemn obligations and refuses to submit to the jurisdiction of the courts.

In *Gibbons v. Ogden* we find an illustration of those excesses of tyranny which during the next hundred and twenty-five years are to appear before the Supreme Court again and again in numerous cases. It is revealed in executive action seeking to destroy

entire industries to serve some theory. Public utilities, from the oldest to the youngest, have suffered repeatedly from such assertions of tyrannical power.

In *Gibbons v. Ogden* we also find a plea for legislative finality. The determination of the legislature regarding what was for the best interests of the community was asserted to be final and beyond examination or review by the courts.

The Supreme Court of the United States held that the act of the New York legislature was void under the Constitution of the United States. It thus held that an act of a legislative body is not above or beyond the operation of law, but is subject to challenge by a citizen in the courts. Previous to this time and for many years, at common law, executive acts had been held subject to review by the courts, and executive officers guilty of abuse of their powers were held to be amenable to actions for damages or subject to injunctions. The significance of this case is that the same principle was therein applied to a legislative act. The federal government had enacted a law covering the licensing of coastwise traffic. The statute of New York, preventing coastwise steamboats from New Jersey from entering New York ports, was thus in direct conflict with this federal statute. Since both acts could not be enforceable at the same time, one or the other must give way. The Supreme Court held that the determination of which act was to give way was a judicial question for the courts. It further held that since the Constitution granted the exclusive right of control of interstate commerce to the federal government, the state statute, coming in conflict therewith, must, therefore, be void, and that no state has any power to pass a statute that would interfere with the due regulation of interstate commerce by the federal government.

This case established the power of the federal government over interstate commerce. It likewise laid down the rule which must

be followed in applying the main principle of the decision; namely, that intrastate commerce, which was reserved to the states for regulation, could be interfered with by the federal government only when to do so was essential in order to carry out the proper regulation of interstate commerce.

But, from the point of view of a pragmatic lawyer seeking evidence of progress of the law, the importance of this decision of the Supreme Court is found in the holding that the legislative act of the sovereign is subject to review by the judiciary and has no inherent or intrinsic finality. Upon the courts rests the duty to determine whether a legislative act is valid or void.

The significance of the case and its influence on the development of the country, both physically and spiritually, greatly transcended the narrow issues it determined. In the physical field the destruction of the monopoly immediately liberated commerce. The development of the steamboat was accelerated, with all that it involved in the way of more rapid communication and greater luxury. Perhaps, even without this decision, the strangling monopoly could not have prevented this natural and inevitable development, but the fact remains that the decision did solve the problem immediately and greatly stimulated the industrial progress of the country. Because of the universal recognition of the great physical benefits derived from this decision, its moral aspects received a greater prestige. The decision gave a great emphasis and impetus to freedom by asserting the supremacy of law to tyranny and oppressive legislative acts.

The case dealt with an interpretation of a written Constitution, which, by its terms, limited the legislative power but did not deal with those essential limitations arising out of fundamental conceptions of justice and right. It did not deal with that heresy which is the most serious threat to freedom; namely, that right follows power. It did not discuss the question whether, when a

power is so used as to be destructive, that in itself is or is not an indication of its abuse. It left to the future the determination of whether or not an act of a state, deliberately setting out to destroy, is in excess of its powers. Indeed, in a contemporaneous case, the Court uttered a dictum that has been misconstrued and misapplied, but which those in office, greedy for power, have repeatedly acted upon. In holding that an import license tax imposed by a state was void, the Court, in argument, stated that if such a tax were upheld it would give the state power to destroy commerce. This statement has frequently been twisted into the phrase that the power to tax is the power to destroy, and the argument has been used as a justification for many destructive acts.

During the last hundred years, the principle that the acts of administrative officers, executive and legislative, are subject to jurisdiction of the courts has been developed in a great variety of cases. Governmental immunity from suit, which is a survival of ancient tyranny and rests solely on the proposition that "the King can do no wrong," has been diminished by the development of the theory in this country, as in England, that the officers of the government, when they exceed their power, may be called to account in the courts, and this must be set down as distinct evidence of advance in civilization.

One cannot read the decisions of the courts in *Kendall v. United States*,<sup>2</sup> in *Ableman v. Booth* and *United States v. Booth*,<sup>3</sup> and in *Commissioners v. Aspinnall*<sup>4</sup> without feeling that by this doctrine a real contribution to moral progress and not merely a development in legal process has been made. This is especially true of those able opinions of Chief Justice Taney in the *Booth* cases. It is equally true of the modern cases applying and extending the doctrine.

The principle of the subordination of executive, administrative, and legislative officers to the judiciary was most fiercely at-

tacked at the time of the Civil War, when the Federal Congress was attempting to establish in this country a worse tyranny than that which had been upset by the Revolution. The Supreme Court of the United States, in a series of powerful decisions, combatted that tyranny and was subject to the most bitter attack in its history. The climax of the fight on the Court came at this time, and ever since then the supremacy of the judiciary may be regarded as a settled contribution to the progress of law during the last hundred years.

Up to 1870, only four acts of Congress had been held unconstitutional, and most of the cases dealt with technical interpretation of the legal limitations on powers prescribed by the written Constitution. Nevertheless, there were early cases which were decided on broader principles. For instance, in *Sinnot v. Davenport*,<sup>5</sup> in *Crandall v. Nevada*,<sup>6</sup> and in *Brown v. State of Maryland*,<sup>7</sup> state taxes on persons leaving the state by railroad or coach were held invalid, and these decisions were based on the right of citizens of one state to enjoy the rights, privileges, and immunities of citizens of another state, rather than upon any narrow interpretation of the interstate commerce clause. In other words, these cases were recognitions of a free and natural right to engage in commerce. In 1873 the court upset statutes attempting to tax property outside the state, not on the ground that they violated some technical provision in the Constitution, but solely because they violated underlying principles of government. In *St. Louis v. Ferry Company*<sup>8</sup> the court said:

"Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void."

In *Loan Association v. Topeka*<sup>9</sup> the Court held that a state statute authorizing taxation to pay city bonds issued in aid of a bridge company was invalid, saying it was a confiscatory decree

under legislative form. The Court stated<sup>20</sup> that there are limitations on the power of taxation "which grow out of the essential nature of all free governments." There are

"Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Thus the Court was broadening its power of review, departing from the theory that legislation, deriving its authority from an external body or person, could be capricious or wanton and that the action of a legislature need not rest on justice and right. The legislative act was held to be binding not merely because of external authority or coercion, but only where it could be sustained by some fundamental principle.

In spite of such cases as the *Chinese Laundry* and the *Oleomargarine* cases, true progress has been made in examining legislative acts judicially. More and more frequently do we find courts looking behind the screen to determine whether or not the statute has some real or substantial relation to its object, is based upon facts, and is consistent with fundamental principles of justice and right.

So long as court review of a legislative act is available, reason and not coercion must be the basis of the final justification of the legislation. This has never been expressed more inspiringly than in the case of *United States v. Lee*,<sup>21</sup> decided seventeen years after the Civil War and while the country was still in the throes of the bitterness of that fierce struggle. When the son of General Lee sued to recover the Arlington estate which his mother had inherited from her grandfather, George Washington Custis Lee, a motion was made to dismiss the suit on the ground that the property was in the possession of officers of the United States claiming it under a tax sale, and since the government had not

consented to be sued no suit could be sustained. Justice Miller held that this immunity did not apply when suit was brought against government officials in unlawful possession of property. He said:<sup>22</sup>

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."

In that case occurs the passage so often quoted:<sup>23</sup>

"Dependent as its courts are for the enforcement of their judgments upon officers appointed by the Executive, and removable at his pleasure, with no patronage and no control of purse or sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives. From such a tribunal no well-founded fear can be entertained of injustice to the government or purpose to obstruct or diminish its just authority."

## II

By the close of the first half of the century progress had been made in subordinating legislative acts to law. The Supreme Court of the United States had survived the most bitter and vicious attacks ever made on a judiciary body in our history. Attempts to limit its jurisdiction and to throw technical obstacles in the way of litigants who sought to challenge tyrannical acts of government had been overcome. During this time the turnpike and canal had been supplemented by the railroad and the horse-cars in cities throughout the country; gas and water companies were well established; and the development of telephone and

electric power had begun. During the last fifty years there has been tremendous development of all those wonderful tools and instrumentalities invented and perfected to make life more comfortable and luxurious. The humblest man today regards as essential the conveniences that were unknown to the richest and most powerful fifty years ago. During these fifty years, besides this triumph in the physical world, there have been invented and developed legal devices by which the enjoyment of wealth can be vastly distributed. The separation of the title and the usufruct of property dates back beyond the statute of uses, but was greatly accelerated by that act. However, it remained for the last hundred years, and especially the last fifty years, to develop the possibilities of such separation through the device of the corporation. One hundred years ago most property could be enjoyed only by actual occupation, even though the right to manage it might be separated from the right to enjoy it. Today the actual benefits from property such as manufacturing plants and electric-power plants are enjoyed by three classes of beneficiaries; those who manage and operate it, including officers and employees; those who take its product, that is, its customers and consumers; and those who receive its profits—the investors, whose interest is represented by stocks and bonds and who receive the net income from it. It is obvious that widespread ownership necessitates separation of management and ownership. The trusteeship remains, but the principles thereof must be extended not merely to directors and officers but to majority and minority control, and this problem has greatly increased the complexity of reconciliation of individual freedom to the play of social interests. The courts and legislators have dealt with the multiplicity of aspects of this problem in a bewildering array of statutes and decisions.

In the utility field we find at least two new devices invented to promote the solution of these problems. The first was the estab-



lishment of an entirely new tribunal, and the second was a recognition of the principles of flexible contract, which were worked out under the guidance of the outstanding figure in administrative law in this country, Charles Francis Adams.

As already pointed out, during the last part of the century corporations were created by special legislative acts, and their charters were attempts on the part of the legislature to anticipate for a longer or shorter period of time all the exigencies of developing business.

Corruption was rampant. It took the form of open bribery rather than of the concealed graft and racketeering of today. It had not extended to our high courts. Out of the financial excesses and abuses and the legislative and political corruptions of Grant's administration came the granger movement, which resulted in the invention of these devices—the flexible contract, and the regulatory bureaus.

The granger movement was directed largely against the railroads and the grain elevators and was due not so much to high rates as to discriminatory rates. It gathered momentum in the West in the year 1870. Illinois, Wisconsin, Minnesota, Iowa, and other states passed statutes fixing maximum rates for railroads and grain elevators and imposed heavy fines for noncompliance. This legislation came before the Supreme Court in the so-called *Granger* cases. In the meanwhile, the panic of 1873 had driven most of the railroads into receivership, and because of this the railroads began to change hands. Their rates fell because of the panic. Their bonds were defaulted, and a great deal of the financial excesses and abuses which had been complained of were remedied by the operation of natural forces.

Nevertheless, in *Munn v. Illinois*,<sup>74</sup> a statute of Illinois fixing the maximum charges on storage of grain in all grain elevators and public warehouses came before the Court and was upheld as

not being confiscatory under the Fourteenth Amendment. The opinion was written by Chief Justice Waite. It was based on the ground that the owner of a warehouse had dedicated the property to public use and by so doing had granted the public such an interest in the property that he "must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

This conception was derived from Hale, but was a decidedly modern application of an old doctrine.

Justice Field dissented, stating that the doctrine, "whenever one's property is used in such a manner as to affect the community at large, it becomes by that fact clothed with public interest," would be so difficult of application as to destroy for all useful purposes the constitutional guaranty. In other words, Field pointed out that on this theory it might be claimed that every enterprise and business conducted for profit could be regulated under the police power.

On the same day that *Munn v. Illinois* was decided, the Court sustained similar laws passed by Illinois, Wisconsin, Minnesota, and Iowa fixing maximum rates for passengers and freight on railroads.

Chief Justice Waite's opinion that private property of such a character was dedicated to a public use introduced a new concept into the law of private property.

The principle that clearly governs the use of public property is that it must be so used as to benefit the public and not some individual. This is in direct contrast to the principle that limits the use of private property. The distinction has never been better stated than by Lincoln, who said:

"I think I have said it in your hearing—that I believe each individual is naturally entitled to do as he pleases with himself and the fruit of his labor, so far as it in nowise interferes with any other man's rights;

that each community, as a State, has a right to do exactly as it pleases with all the concerns within that State that interfere with the rights of no other State; and that the general government, upon principle, has no right to interfere with anything other than that general class of things that does concern the whole."

Up to the decision of *Munn v. Illinois*, it was quite generally believed in this country that the only limitation on the use of private property was expressed in the Latin maxim *sic utere tuo ut alienum non laedas*, and that it was not necessary to show, before one could use one's property, that such use was going to benefit another—it was enough that the use which one proposed to make of it would not injure another. This is exactly the contrary to the principle applicable to the use of public property. Chief Justice Waite laid down the principle that a private enterprise, when dedicated to the public use, became clothed with a public interest and that, therefore, the owner could be restrained from using his property to the injury of others. This decision laid the basis for a developing theory that such private enterprises must affirmatively show that the use of their property will benefit others.

The decisions in the *Granger* cases were greeted throughout the West with paeans of triumph, but it was not many years before the victory was recognized to be a Pyrrhic one. Capital deserted the states that treated the railroads as beyond the protection of the law, and no more money for railroads flowed into these states. No new roads were constructed, and worn-out equipment was not replaced. Although the rates for carrying the products of these states to market were legislated down to a low level so as to invite the farmer to use the railroad, he could not get his wheat to market because there were no physical means of transportation. The legislators could prevent the railroads from

charging a rate adequate to render service, but they could not prevent deficient service.

The laws were finally repealed about 1878, and it was at that time that the state railroad commissions were established, with power to fix rates after due investigation and to frame and administer regulatory provisions.

Both legislators and courts had fallen down on the realistic performance of their functions. Legislation was not based on any scientific investigation or determination of facts and was inflexible. The courts were failing on the administrative side.

The railroad commissions established at this time were designed to remedy these defects. Instead of having a rate fixed by the legislature on some theory of what was fair, the railroad commission was required to make a careful investigation and, after determining the facts, to fix the rate. No provision was made for court review. In fact, court review was not contemplated, as it was then thought that under *Munn v. Illinois* the railroad was outside the protection of the courts, and that what the legislature considered fair would be subject to such a conclusive presumption as would prevent its being examined into and upset. On the other hand, these new tribunals were supposed to determine in advance what was a fair rate so that the whole practice of waiting until an exorbitant rate had been charged and then resorting to a court to recover damages because of a wrong already done was changed to a preventive practice where one might learn in advance what was fair and right and conform to it. There can be no question that this contribution in 1878 was a distinct step in advance and a mark of progress in the development of the law.

Nine years later the courts pointed out a way to correct the tyranny of much ruthless regulation. In *Stone v. Farmers Loan and Trust Company*<sup>25</sup> the Mississippi statute providing for a railroad commission, with full regulatory powers, came before the

Court. The Court intimated that the question of what was a reasonable rate might be a question ultimately to be determined by a judicial proceeding, and not one solely for the legislature, saying:<sup>16</sup>

"This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

Four years thereafter, in *Chicago, Milwaukee and St. Paul R. R. v. Minnesota*,<sup>17</sup> the Court held that a statute establishing a railroad commission for Minnesota was void because it deprived the railroad of the right to a judicial review of the rates fixed by the legislature. In other words, the Court once more asserted the subordination of the legislature to the law.

This in part overruled the *Granger* cases—certainly that portion of those cases which held that the statutes considered therein did not violate the due process clause of the Constitution. It was thus established that in exercising its control over private property devoted to a public use the state must determine what is fair by a process of law and cannot act in a merely arbitrary way, and even its determination is subject to challenge in the courts. Thus, by this case, we come around full square to the doctrines for which Coke fought and which were exemplified in *Ogden v. Gibbons*.

The state railroad commissions were largely superseded by the Interstate Commerce Commission in 1887, but those that did survive, with one or two exceptions, notably Massachusetts, became political bodies and were in no sense of the word disinterested,

impartial tribunals for the ascertainment of facts in a scientific way and the impartial administration of governmental policies.

The Massachusetts Commission, owing to the brilliance and high character of Charles Francis Adams, was a notable exception. In the early nineteen hundreds, students of the problems connected with the growth of public-utility enterprises, such as electric, gas, water, and telephone systems, were satisfied that the old franchise contract was based on an erroneous conception of the function of these instrumentalities of public service. They also realized that one of the fundamental misconceptions undermining the proper functioning of state railroad commissions was the prevalent belief that public utilities must be compelled to compete. There was a recognition that the service performed by utilities was a continuous service to the people, indefinite in duration and superior to minor fluctuations and changes.

Protection of capital was as essential to service as protection of the consumer. It is notable that the Massachusetts doctrine of prudent investment was established at the very time the railroads were contending for it as a requisite to the protection of their investors.

Further, in order to give greatest efficiency, it must be recognized that competition was detrimental and always resulted in poorer service and higher rates. In this particular field monopoly was essential if the public was to be properly served. The separation of management from ownership and use required some administrative tribunal more responsive than a court of equity to determine whether the trusteeship was properly discharged. People were just as fearful of the tyranny of power in private hands as they were of the tyranny of power in government hands. To reconcile these conflicts, public-service commissions were established during the early part of this century. Wisconsin led off,

followed by New York. The great bulk of the laws was passed before 1912. To those who took part in this movement it seemed as though giant strides in law reform were being made.

The machinery of the law had fallen behind because of lack of specialization in an age of specialization, and because scientific methods of ascertaining facts which were universally used in industry and other fields were closed to the courts by medieval shackles. The law's delay in applying remedies resulted in grave injustices. When prevention rather than cure was the aim and object of all professions, the courts still clung to the latter and did not even develop the injunction to the extent that was possible. A declaratory judgment, although known as a device, was entirely undeveloped. The establishment of the commissions promised a method by which facts essential to the solution of complex problems of rates and service could be adjudicated in advance, the service could be protected from the raids of unlimited competition, and those taking the service could be protected from the abuses of power in a monopoly. The establishment of these commissions was a definite recognition of the impossibility of prophesying for both rates and service, and furnished the means of making more flexible franchises and contracts. The investor could be protected by supervision of issuance of securities, by control of accounting, and by modifying the rates and service requirements from time to time to ensure him a fair return.

Since their establishment, a more scientific adjustment of rates and a more equitable distribution of charges have resulted, and discrimination both in service and in charges has been largely eliminated. Rates and services have been made more flexible. Competition, with all its attending waste, has been eliminated. The opportunity of having facts determined in advance of stock

and bond issues and of rate increases or decreases has been a great improvement and benefit.

In many respects the mechanical bases of law reform have been improved. For the most part these commissioners are appointed. Their independence has been safeguarded by larger salaries and greater security in tenure of office than has been accorded to the courts. They have been given a free hand to develop procedure and to accept evidence, unbound by the shackles that hamper the courts as a legacy of an outworn tradition. They have been given ample assistance in the way of scientific aids. In spite of this they have frequently been made a football of politics and have had their independence interfered with by the executive as well as by the legislator. Further, they have on occasion taken a partisan position between different classes of the community whose respective interests must be reconciled by their action, and during the last twenty-five years have sometimes shown a marked disregard of the rights of the investor in the desire to benefit the consumer. Modern discrimination is not so much between classes of consumers as between investors and consumers.

Moreover, the commissions have failed in the determination of the facts. It is axiomatic that a man should not judge his own cause. The position of every complainant or defendant is inconsistent with impartiality. In hearings before commissions it is not an uncommon thing to find witnesses appearing on behalf of the commission to give testimony that they were instructed to give in order to sustain a predetermined finding. A large portion of the court reversals and the criticisms that have arisen from regulation through these commissions has come from the failure of commissioners frankly to recognize that their fact-finding function should be performed in a judicial and scientific spirit.

It is still argued in political circles that commissioners are not



quasi-judicial officials but are solely subject to the direction and control of the executive. However, the Supreme Court in a recent decision<sup>18</sup> has reaffirmed the doctrine that commissioners are judicial officials and independent of the executive.

The commissions have shown, almost universally, a lack of responsibility toward the service and its requirements and a most lamentable lack of responsibility toward the investor. For the fight to prevent extortion and discrimination there has been substituted a fight to prevent confiscation of the property of stockholders and bondholders of the company. The commissions look upon themselves as the managers of the property, without financial responsibility. They look upon themselves as being given the duty to say what service shall be rendered and what rates shall be charged, regardless of the financial rights and interests of the owner. In repeated decisions they have attempted to establish the principle that the owners of the property cannot act without first demonstrating that the action which they propose taking will *benefit* the public, thus completely nullifying the old concept of property, which is that the owner can use it in any way he pleases so long as he does not injure another. This was particularly apparent in connection with mergers and consolidations, and has been embodied in many sections of the public-utility laws enacted during the last few years.

Massachusetts has been a conspicuous exception, with but four rate cases in fifty years. This triumph is not due to the state's theory of prudent investment but to its high tradition of fairness and sense of trusteeship. It has had equal regard for the rights of the investor and for the rights of the consumer, and a high purpose to do equal justice between the investor and the consumer. Without this purpose the element of judgment in what constitutes prudent investment and in what constitutes a fair return would

have produced as many rate cases in Massachusetts as in the rest of the country.

What has become of the cases holding that there is a presumption that the acts of the management were fair and reasonable and must be sustained as against regulative orders, unless there be a clear showing that they were improper, arbitrary, or otherwise unreasonable, unfair, or unjust? This presumption has entirely shifted. A short time ago a public utility had the right to initiate its own rates and to charge those rates unless the state demonstrated that they were unfair, improper, arbitrary, or otherwise unreasonable. Today, in practice, no rate can be charged until it is first fixed by the commission. There was a time when it was presumed that contracts made by the management were fair and reasonable; that the amounts paid for operating expenses were proper; that the amount set aside for depreciation was reasonable and necessary; and that none of these things could be interfered with without a clear showing of abuse of power. Today all this is changed. Determined efforts have been made by the state to regulate the price of materials and supplies furnished to public utilities, and by such regulation to control the operations of the companies furnishing them. Up to now this regulation has been sustained only where the purchaser and seller are affiliated, but statutes during the last three years have carried the definition of "affiliation" to great lengths.

Today we see attempts to place commissions above the law, to eliminate the right of court review, and indirectly to nullify the decisions of the court by administrative orders, such as those prescribing uniform systems of accounts and the like. We find the federal government invading the field reserved by the Constitution to the states, and repudiating and evading its contracts, promoting destructive competition and employing the sanctions of

destruction and coercion. In the electric field we behold a policy of direct competition deliberately entered into by the government, which cannot help but result in destruction to a large part of the industry. The radio is subject to a political censorship that threatens freedom of speech and criticism. The unjust assault, without a hearing, on the aviation industry by a government official is too recent and too disastrous in its consequences to be readily forgotten.

Several issues of fundamental importance are presented about which the controversies of the future will resolve and which will determine the lines along which development will occur.

The distinction between regulation and management and the question of whether federal, regional, or local regulation shall prevail will, of course, give rise to much litigation. Another fundamental issue that confronts not merely the public-utility industry but the country as a whole is the question whether the right to enjoy private property is limited only by the requirement that it shall not be used so as to injure others, or whether it is limited by the restriction that the owner must show that some benefit will result to the public from that use.

A third fundamental issue will center on the attempt to extend the field of what constitutes public utilities. Just as Judge Field pointed out in the *Munn* case, there is no limit to the extent to which the doctrine of dedication to a public use can be pushed.

But the most subtle and dangerous issue of all is that which centers on the efforts to prevent the challenge of executive and legislative acts in an impartial tribunal. This attempt is frankly made in many public-utility laws by eliminating or limiting court review in every way possible. Congress only recently denied utilities access to the federal courts. It is self-evident that the tribunal which is to determine the facts and the principles must in its very essence be impartial, must have a long tradition of search

for justice, and must rely upon reason, not coercion, to sustain its decisions. Without these vital essentials there can be no progress. This is what makes the struggle to deprive the courts of jurisdiction over the acts of these boards and administrative tribunals so menacing. The tyrant, be he king, executive, or legislator, invariably claims immunity from suit. First he claims that he cannot be sued at all; second, that his determinations of fact are final; third, that his determinations of policy cannot be inquired into. As a last resort he will undermine the impartiality of the tribunal by packing it with puppets or by destroying its independence through insecure tenure of office. Coercion is the chief weapon of the tyrant. He always employs the threat of destruction in order to enforce his will, but he always seeks and demands full immunity from an accounting for his acts.

Thus far the courts have erected a bulwark against this tyranny, and, in extending the principles of *Gibbons v. Ogden* and those early cases, they have laid a firm foundation for real constructive progress in the future. But until these new administrative tribunals have cultivated, established, and practised a full sense of justice, a scientific approach, and a high standard of appeal to reason, they must inevitably fail. To paraphrase a thought from Rousseau, we must go back if we are to advance. We must recapture that fiery indignation against tyranny and oppression which inspired our ancestors, and we must refuse to accept mere good intentions as substitutes for truth and justice if the progress toward the reconciliation of the freedom of the individual and the social and cultural interests of society is to be resumed.

## NOTES

- <sup>1</sup> 9 Wheat. (22 U. S.) 1 (1824).  
<sup>2</sup> 12 Peters (37 U. S.) 524 (1838).  
<sup>3</sup> 21 How. (62 U. S.) 506 (1858).  
<sup>4</sup> 21 How. (62 U. S.) 539 (1858); 24 How. (65 U. S.) 376 (1860).  
<sup>5</sup> 22 How. (63 U. S.) 227 (1859).  
<sup>6</sup> 6 Wall. (73 U. S.) 35 (1867).  
<sup>7</sup> 12 Wheat. (25 U. S.) 419 (1827).  
<sup>8</sup> 11 Wall. (78 U. S.) 423, 430 (1870).  
<sup>9</sup> 20 Wall. (87 U. S.) 655 (1874).  
<sup>10</sup> *Id.* at 663.  
<sup>11</sup> 106 U. S. 196, 1 Sup. Ct. 240 (1882).  
<sup>12</sup> *Id.* at 220, 1 Sup. Ct. at 261.  
<sup>13</sup> *Id.* at 223, 1 Sup. Ct. at 263.  
<sup>14</sup> 94 U. S. 113 (1871).  
<sup>15</sup> 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191 (1886).  
<sup>16</sup> *Id.* at 331, 6 Sup. Ct. at 345.  
<sup>17</sup> 134 U. S. 418, 10 Sup. Ct. 702 (1890).  
<sup>18</sup> Rathbun v. United States, 295 U. S. 602, 55 Sup. Ct. 869 (1935).

## PROGRESS OF LOCAL GOVERNMENT

1836-1936

CHARLES W. TOOKE

THE year 1935 in England marked a well-defined century of progress in local government. It was the centennial year of the adoption by Parliament of the first Municipal Corporations Act, which was to extend a centralized governmental control over the organization and administration of the various local governmental units which either had existed from the time of the Conquest or had been created by charters under the prerogative authority of the English Crown.<sup>1</sup> The "system" consisted of a conglomeration of cities and boroughs, each with its own peculiar organization, powers, and privileges. Many of them were close, self-perpetuating corporations, whose incorporators not only had taken to themselves the exercise of the local governmental powers, but also had come to treat the property of the corporation as an emolument for their own benefit. Lord Eldon had enunciated in Parliament without controversion that "corporations were situated precisely the same as individuals, they held property not in trust and over such property the corporation exercised the same rights as individuals did over their own property."<sup>2</sup>

In reviewing the progress of the last hundred years, English publicists lay great stress upon the changes wrought by the Act of 1835, which declared that henceforth all property of the local corporations should be held as a public trust for the inhabitants of the municipality and should be administered for their benefit, and which set up the requirement that the control of the administration should henceforth be in the hands of representative councils chosen by the resident electors. The power to enact by-

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laws for local police purposes, which had, in addition to that founded upon custom, been accorded the boroughs subject only to the limitation that "they be not repugnant to the laws of the nation nor against the public or common good of the people," was continued, and all local acts since that time have been subject to judicial determination as to their basis in delegated power, the validity of their enactment, and their reasonable consonance with the laws of the realm.<sup>3</sup>

Three other important points are emphasized in noting the changes wrought in the past hundred years in English local government: the building up of a central administrative control; the establishment of permanent staffs of professional officials who administer local affairs under the supervision of the elected councils; and the system of rates to meet the recurring financial requirements of the municipality. The English may properly boast that, as a result of the reform of 1835 and the subsequent legislation, their municipalities today enjoy the widest freedom in the matter of local enterprise; while at the same time, through the drastic control of the central administration and the conditions upon which it authorizes capital outlays, securities issued by any local corporation in England rank on a par with those of the Bank of England.<sup>4</sup>

Any attempt in a short essay to duplicate the comprehensive surveys of municipal progress in England in the past century by a corresponding review of the development of municipal government in America would, of course, be preposterous. The task of tracing the common development of local governmental organization from colonial days down to the present time, with over forty jurisdictions, is of itself a tremendous undertaking.<sup>5</sup> It may be worth-while, however, to draw a corresponding picture of local governmental conditions in the United States in 1835, to point out how much further our own law had progressed at that

time, and to evaluate roughly its evolution in the past century. The natural point of departure may be found in the political review of the first great commentator on American institutions, Alexis De Tocqueville, followed by a glance at the social and economic background of municipal corporations of that day, their organization, and the law that inspired and guided their active life.

In January of the year 1835 there appeared from the press of Gosselin in Paris the first edition of a book that was to raise its author to the highest rank of publicists of Europe, De Tocqueville's famous work, *De la démocratie en Amérique*. Hailed in France as the greatest philosophic treatise of the age on government and welcomed in England as an argument against the "tyranny of majorities," the work was received in America with laudation, and editions were soon published<sup>6</sup> in England and the United States. One might well expect in a monumental work of this scope a comprehensive exposition of local governmental agencies, which the author asserts lie at the very foundation of the social and political structure of the country. But only one chapter in the entire work attempts to deal with the structure of local government and that mainly with the organization and workings of the New England towns, the spirit of which, as he sees it, permeates local institutions throughout most of the other states.

In this chapter the author recognizes that the same principles apply to local government throughout the several states, the towns, and the counties, but devotes his discussion to their exemplification in the New England town. He regards these local subdivisions as antedating the state, to which they have surrendered part of their original powers. He emphasizes the political principle of local independence in local affairs, yet recognizes that the towns are required to comply with the demands of the



state, to execute duties imposed upon them by statute. This subservience he describes as a principle of political conformity and notes that concerning the manner of the execution of their duties the towns are largely left to exercise their own judgment. He points out the absence of what he denominates the "administration" in local affairs, but asserts that of necessity it exists, although in an impalpable form. He comments especially upon the absence of police regulations imposed by the state and upon the control of the minor details of social life by local enactments. The subjection of local elective authorities to the control of the courts he regards as necessary in order to preserve order and uniformity. He says that the county session made up of the justices of the peace, officers appointed by the state government, is in county affairs an administrative body but in township affairs a judicial body, thus concealing under the form of the law the administrative compulsion of the state. All local officers and even the towns themselves may be prosecuted in the state courts for derelictions of duty. Local officers are thus made subject to the control of the courts in the matter of specific acts, and to the periodical elective veto of their constituents in their general conduct.

To his credit, in evaluating the status of the New England town De Tocqueville avoided falling into the error of believing that these municipal corporations were *imperia in imperio*, although some of his advisers gave him reason to think so. Jared Sparks, in answer to one of De Tocqueville's questions, had written him that "within the limits of a town, the people were always a body politic, acting, under certain restrictions, as an independent republic, in the regulation and control of their local affairs."<sup>7</sup> The great publicist saw clearly that political and legal principles were distinct, though constantly interactive. He was too much impressed with the force of the "certain restrictions" mentioned by Sparks to infer that the political theory of an inher-

ent right of local self-government had its counterpart in the legal structure under which these democratic institutions had their being.<sup>8</sup> These restrictions consisted of general laws applicable to all towns, defining their powers and enforced by the courts, and were enforced by the subjection of the towns themselves or their officers to penalties for acts in violation of the duties imposed upon them.<sup>9</sup> The popular control lay in the functioning of the town meeting as the sole legislative body and its annual election of local administrative officers. Without the control of state courts to compel the performance of these administrative duties and to define the limits of their delegated powers, New England towns could not have functioned. With it, the body of citizens was content to let those members of the electorate in attendance upon the town meeting enact local ordinances, incur contractual obligations, and levy taxes to meet obligations for which each property owner might be made personally liable. Upon the gradual introduction of local representative government in the larger centers of population,<sup>10</sup> these controls were fully retained and ensured an administration that could not unduly encroach upon the rights of the individual citizen.

De Tocqueville has but little to say about local government outside of New England, except to note that toward the south the county tends more and more to become the predominating unit. He notes the similarity in the county organizations of New York, Pennsylvania, and Ohio, in which an elective board of supervisors executed local duties imposed by the state, and had power to impose taxes for county purposes. He asserts that the universal characteristics of the American system are the popular election of local officers and the consequent inalienability of their functions, the absence of a gradation of their powers, and the existence of a judicial control over the secondary branches of the administration.

Of municipal corporations, local governmental units exercising legislative powers, except the New England towns, he has still less to say. He fails to mention the existence of that already numerous class of smaller municipalities with elective officers, the villages and boroughs of New York, New Jersey, and Pennsylvania. Of the organization of the government of cities in New England or elsewhere, of which some thirty-odd are listed in the 1830 census, De Tocqueville has not a word to say. The great cities, such as New York, Boston, Baltimore, and Philadelphia, he considers marts of commerce controlled by the trading interests, insulae in the ocean of all-permeating democratic institutions, and because of their heterogeneous population liable to disintegration unless the strong hand of the state shall bring them under subjection.<sup>11</sup> De Tocqueville was neither a lawyer, an economist, nor a statistician; like his great predecessor, Montesquieu, he was interested in the spirit of the laws and not in the laws themselves. That he entirely overlooked his opportunity to make a study of city institutions was characteristic of the age. Cities in 1835, both in England and the United States, were anomalies in the political organization, children of chance to which the ordinary principles of government seemingly did not apply. Their social problems were only beginning to be appreciated and their legal position was in several respects still undetermined. In America, as in England, the industrial revolution was bringing in its train the rising power of the hitherto forgotten man. As Lord Bryce has well said of this period, the masses of the people had come to realize their power and the theory of democracy was about to be realized in practice.<sup>12</sup>

It may be well at this point to examine briefly the local governmental structure existing at the time De Tocqueville wrote so as to formulate some idea regarding its organization and the extent to which the fundamental legal principles that have shaped

its progress from that time to the present had then been evolved. While still made up of predominantly agricultural communities, great commercial centers were being developed and the problems of urban as distinguished from rural local administration were about to be urged to the fore.

The year 1835 found the United States in the midst of one of its great eras of conscious expansion in population and wealth. It was a period of self-sufficiency if not of self-satisfaction. The realization that unlimited resources awaited only an increased population and better facilities of communication and transportation had led to a race among the larger cities on the Atlantic coast for commercial supremacy. New York through its external and internal commerce, stimulated by the Erie canal, had already outdistanced its rivals, but the recent application of steam power to shipping and to railroad left the race still open in the popular mind to all those who could first take advantage of these inventions. By way of contrast with the rapidly disappearing stage-coach days, travel and transportation both by land and by water had become speedy, certain, and convenient.<sup>13</sup> And upon the site where these words are penned Morse was busy perfecting the electric telegraph, soon to be made known to the world and to revolutionize the art of communication. Business had at hand, ready for use, the recently developed engine of corporate organization, foreign capital was ready to invest in railroad construction, and the state legislatures were eager to grant liberal charters for internal improvements. The financial interests were stimulated by the conviction that monopolies in public franchises were to be had by any one who could finance their use and were encouraged by the opinion of many of the leading lawyers and statesmen that, once acquired, such powers were forever protected by the contract clause of the American Constitution.<sup>14</sup> The tempo of the times was manifest in the rapid settlement of new

states to the west, in the development of commerce in the Mississippi Valley,<sup>15</sup> in the growth of manufactures in steel and textiles in the older states, and in the multiplication of banking<sup>16</sup> and insurance companies,<sup>17</sup> all of which were contributing to the rise of the centers of trade and commerce, the precursors of our modern cities. Speculation in public lands, by the sale of which the national debt had been wiped out, and the wave of cheap money, resulting from unwise tampering with the currency, had led to an inflation of commodity prices and had paved the way for the financial debacle of the following years. But this catastrophe was not to be sufficient to check materially the growth of the cities, which already were becoming aware of some of the social and political problems that everywhere attend the concentration of population in restricted areas—problems of police, fire protection, education, water supply, and sanitation.<sup>18</sup>

New York, like other large cities, was just waking up to the fact that men in the mass cannot live like men in the open, and the recent epidemics of fever and cholera had impressed upon the public consciousness the necessity for adequate sewers and an abundant water supply.<sup>19</sup> No uniformed police force was maintained and the fire department was upon a volunteer basis.<sup>20</sup> The streets in the lower part of the city were paved with cobblestones and the movement to light them with gas had only recently been begun.<sup>21</sup> How little the city government up to this time had been concerned with public works may be seen in the fact that with a population of 269,873<sup>22</sup> within an area coterminous with the county, covering all of Manhattan Island, with taxable property of \$180,000,000<sup>23</sup> and an annual expenditure of nearly two millions, its total debt as of December 31, 1834, was less than one million dollars.<sup>24</sup>

How poorly the larger cities of the Eastern states were equipped to meet these exigencies cannot be determined from an ex-

amination of their formal charters, for a cursory reading of what are frequently spoken of as the local constitutions of such representative cities as Boston, Philadelphia, Baltimore, and New York will reveal but little of the actual functioning of their local governments.<sup>25</sup> These documents deal almost exclusively with the organization of the official structure. Since the Revolution all city charters had emanated from the state legislatures, which had taken over this royal prerogative of the colonial days.<sup>26</sup> The English example in one respect, however, was still rigorously adhered to—each new charter was a special act of state legislation, but seldom if ever enacted except upon the application of the citizens in control of the local government.

The charter of Boston, drafted by Lemuel Shaw and enacted in 1822, scarcely did more than set up a representative government consisting of the mayor, board of aldermen of eight members, and a common council of forty-eight members, all to be chosen by the qualified electors. Fully half of the charter is taken up with the provisions governing the election of these officials. The mayor and the two boards together constituted the city council, to which were committed the legislative functions of the old town meeting. The mayor and aldermen became the administrative officers, supplanting the former selectmen. The town overseers of the poor and the school committee were continued with their former powers, but made accountable to the city council. Thus it is apparent that the changes wrought consisted mainly in providing a permanent executive and a continuing legislative body subject to parliamentary rules in place of the former statutory control limiting the jurisdiction of the town meeting. While the power of the towns to enact by-laws was subject to the control of the court of sessions, the new charter provided that ordinances duly enacted should take effect without the sanction or confirmation of any court or other authority whatsoever. It was made

plain, however, that all such by-laws must conform to the constitution and laws of the commonwealth and be subject to annulment by the state legislature.<sup>27</sup> No powers additional to those of the towns were given; a change, not a substitute, was proposed for the more impracticable existing town organization; the entire program was made subject to its adoption by written vote of the inhabitants in town meeting assembled.<sup>28</sup>

If we turn to the South, we find both Philadelphia and Baltimore organized on the model of their state governments, with two houses for local legislation. In Philadelphia, the lower house of twenty members is annually elected by the qualified voters of the city. Four members of the upper house of twelve members are likewise chosen by popular vote each year. In the hands of the select and common council are vested all the legislative powers of the city. The administrative and judicial powers are exercised by a recorder and fifteen aldermen, appointed by the governor of the state to continue during good behavior, charged especially with the duty of selecting annually one of their members as mayor of the city. While primarily executive officers, the mayor, recorder, and aldermen are invested with broad judicial powers to be exercised as prescribed by the charter. Local legislative powers are granted as may be "necessary or convenient for the government and welfare of said city" but expressly subject to the condition that "the same shall not be repugnant to the laws and constitution of this commonwealth."<sup>29</sup>

The organization of the local government of Baltimore at this time was still largely determined by a charter enacted by the state legislature in 1796. Here again we find the local legislature bicameral, the first and more numerous branch consisting of two members from each ward,<sup>30</sup> elected by popular suffrage. The second branch of eight members and the mayor are elected biennially by a special board of electors, two from each ward, chosen

by the qualified voters. The mayor so elected is an independent executive, but vested with a veto upon all ordinances and resolutions of the local legislature. Differing from the charter of Boston and Philadelphia, the powers granted to and the duties imposed upon the city officials are set forth with considerable particularity, a precursor of the later common usage which practically wiped out the effectiveness of the so-called general-welfare clauses of our municipal charters.<sup>31</sup>

Were one to examine the organization of the smaller municipalities in Pennsylvania and Maryland in 1835, one would find there as in the states of New Jersey, Virginia, and North Carolina distinct types of organization set forth in special charters, but all having in common the principle of a broad popular elective basis for the local legislature.<sup>32</sup> It would be seen that executive and legislative functions, and outside New England judicial functions as well, were often exercised by the same official bodies. For the most part one will look in vain in these charters for an enumeration of the governmental duties and the local powers conferred upon these agencies. Their charter powers, in the broader sense, are to be found in scores of general and special statutes, the limitations of which are defined by the decisions of the courts.

When we turn to New York, we find that here as in the other large cities a bicameral body known as the council exercised most of the legislative and judicial powers delegated to the municipality. The mayor, chosen at this time by the council, was entrusted with a suspensive veto which might be overridden by a majority vote of each house. Under the provisions of the Montgomery charter of 1730, still regarded as the basis of the local government, the mayor had been appointed by the governor. Upon the confirmation of the charter in 1777 by the state legislature, such appointment was vested in the governor and council of appointment. By a constitutional amendment adopted in 1826, it was



provided that the mayors of all cities in the state should be appointed annually by their respective local councils.<sup>33</sup> The mayor of New York continued to be appointed by the local council until 1834, when the Act of March 3, chapter 23, directed that he be annually chosen by the electors of the city.<sup>34</sup> The broad ordinance-making power of the Montgomery charter had been made expressly subject to the qualification that the local ordinances should not be repugnant to the laws of England or of the province.<sup>35</sup> Originally ordinances were to remain in force for a period of one year and had to be reenacted annually, but in 1813 their ultimate term had been extended to three years.<sup>36</sup>

It can readily be seen from this brief summary that each of these leading cities had a governmental organization differing from that of the others. The same statement would be approximately correct for the numerous smaller cities in each state; all had been created by special legislative charters, usually upon the solicitation of local interests and with modifications in their governmental structure to suit what may have been conceived of as their local needs. In New York, for example, the counties of the state were divided into administrative units called the towns. There was no uniform law providing for the laying out of these subdivisions, new ones being created out of the old from time to time by acts of the legislature. Codifications of the various laws relating to the towns and to the counties were being drafted and were published in the Revised Statutes of 1836.<sup>37</sup> The revisers promised in the first volume of the work that a similar codification would be completed for the numerous villages of the state and published in the third volume. They doubtless found that a codification of the charter provisions of the various villages, each organized by special act and with special legislative powers, was a far more difficult task, if not an impossible one, and there-

fore contented themselves with proposing a uniform method to be followed by a community in applying for a village charter.<sup>38</sup>

This system of special incorporation for the subordinate municipalities similar to villages was still prescribed in the states to the south and to the west, so that it is fair to say that in no state outside of New England did there exist a municipal system that could be called uniform. As each of the states had its own system of counties and towns, charged with the administration of locally important governmental functions, such as taxation, highways, care of the poor, and education, nowhere was there seen any occasion for requiring the municipal organization to be cast in the same mold. Local determination of municipal organization, regarding both structure and legislative powers, was then as today a peculiarly American institution. Although in most of our states today municipal powers of local legislation have been conferred by general law upon the counties and the towns, there still persists the political policy of leaving to the choice of the local electorate the form of the organization under which they will work and sometimes even the powers they are to exercise.

Certain fundamental facts, however, bearing upon the legal status of the various local governmental units at this period stand out clearly: the municipal corporation is primarily an agency of the state and subject to the sovereign power of the state legislature, which, except as limited by constitutional law, had inherited the prerogative powers of the Crown of England and the sovereign legislative power of Parliament. All formal incorporations by legislative act are distinctly parliamentary in character and may be revoked by the legislative power that created them;<sup>39</sup> their governmental powers, such as taxation and eminent domain, which affect the individual citizens, are delegated powers that can be exercised only by the officers<sup>40</sup> and in the manner<sup>41</sup> designated by statute. Their general powers of local legislation

are restricted to those expressly granted or necessarily implied,<sup>42</sup> and their scope qualified by the standard of reasonable application to local needs.<sup>43</sup> Without exception, in all jurisdictions the state courts are the recognized agencies to interpret the extent of all municipal powers and to hold their exercise within the limitations prescribed.<sup>44</sup>

It can readily be seen from this brief summary that the fundamental principles of our municipal corporation law had already been worked out by the courts in reconciling the inherited doctrines of English law to our new constitutional system. It is true that then as at present no satisfactory theory of liability of the corporate entity for invasions of the rights of the individual citizen had been developed, although it had been held in several jurisdictions that for acts within the scope of their delegated powers which invaded rights of private property they were to be held to strict accountability.<sup>45</sup> It was already foreshadowed that private rights arising under municipal contracts made in pursuance of statutory authority were protected by constitutional limitations.<sup>46</sup> The methods by which the local authorities could exercise such powers had not been particularly defined, but already it had been held that local governmental police powers were not subject to alienation by contract.<sup>47</sup> The dual character of the municipal corporation as a governmental agency at once for the administration of state functions and for the satisfaction of peculiar local needs was already fixed, but the demarcation of what are purely "municipal" as distinguished from "governmental" affairs had not yet been worked out, a distinction that has been subject to a century of legislation and judicial interpretation and is still far from ultimate clarification.<sup>48</sup>

In all the states from the time of the Revolution the supremacy of the legislative department had been recognized. It has always been and still is a fundamental principle of our law that

state constitutions, as well as the federal, are but limitations upon the inherent sovereign authority of state legislatures. This supreme control of the state legislature over the creation and abolition of our municipal corporations, over their powers and the manner in which they are to be exercised, has from the earliest days been subject to the corresponding political principle that the legislature should always be responsive to the wishes of the local authorities. Between these two conflicting principles of law and politics, American municipal government in each of the several states has had to work out its history of gradual adaptation to the social and economic needs of the generation. With so many sovereign jurisdictions, the process of development has had to be one largely of trial and error. That through the years one can trace well-defined currents of similarity has been due to the imitative nature of so much of our state legislation, both constitutional and statutory, and to the uniformity imposed by a judicial system applying a common law and common principles of constitutional and statutory interpretation.

The popularization of democracy during the years from 1835 down to the outbreak of the Civil War was reflected in the legislative supremacy that marked that era. State legislatures, not yet restricted by constitutional amendments, were readily responsive to local demands for an extension of their powers. While general laws were enacted for the incorporation of inferior units of local government, such as villages, boroughs, and incorporated towns, these were frequently supplemented by special acts, and uniformly cities were created by special charter and their powers extended from time to time by special legislation. Under the leadership of Chief Justice Taney, the Supreme Court in 1837 had recognized the police power of the states as untrammelled by the Federal Constitution,<sup>40</sup> and the reluctance of that Court to declare invalid the acts either of Congress or of the state legisla-

tures was reflected in a similar attitude of the state courts toward both state statutes and local ordinances. Indeed, most questions of local power could readily be solved either by applying for preliminary authorization or subsequent validating acts.<sup>50</sup> Notwithstanding the supremacy of control of the state legislatures over municipal activities, the period up to 1854 was really one of almost unrestricted home rule through the dominance of the political concept of popular local sovereignty.

The lack of any effective legislative control over the organization and powers of our municipalities at this time stimulated local initiative and made possible a constant adjustment of the law to the social and economic progress of the day. But it carried in its train certain evils that continued to bear acrid fruit for many generations. The first of these was the growth of the spoils system, the result of the intensification of the party spirit in national and state politics. Party organizations came to depend upon local patronage for their sustenance, an evil which remains to haunt us to this day. Beginning about 1850 the party in control of the state government began to make use of its position by setting up local boards and conferring upon them wide administrative powers and sometimes legislative powers as well. By 1860 the city councils had lost practically all their functions except the legislative, and local administration was largely in the hands of independent boards, often appointed by the state government and in most cases acting within their spheres independently of the council or of the mayor. Questions of national politics absorbed the interest of the electorate, who were content to have their local needs taken care of either directly by the state government or by private enterprise. Internal improvements became the dominant political issue of the day and not only cities but towns and counties also vied for the privilege of subsidizing railroad enterprises that promised to give them better facilities and greater prestige.<sup>51</sup> Thus was laid

upon the localities the first great burden of debt that soon called for drastic restrictions upon the power of state legislatures over the organization and functions of the municipalities.<sup>52</sup>

The aftermath of the Civil War naturally carried with it an apathy to civic righteousness that was reflected in local corruption, such as led to the Tweed scandal in New York in 1873. The necessary dominance of the executive in time of war lessened legislative prestige, which was further circumvented by constitutional amendments. Several states soon followed the early example of Ohio in requiring incorporation of municipalities by general law.<sup>53</sup> Others adopted stringent limitations upon indebtedness<sup>54</sup> and the loaning of credit to private enterprises.<sup>55</sup>

In the limited space of this paper, it is impossible to trace the progress of the development of our municipal system during the past fifty years. For our immediate purpose it is sufficient to note that in this period of greatly expanding population and economic power, the number and variety of forms of local government have kept pace with the necessary extension of municipal functions.<sup>56</sup> The complexities of municipal organization, based upon an analogy to the federal and state governments, have been largely superseded by a greater concentration of the exercise of local powers in the executive and in a unicameral legislative body. The introduction of the commission form of local government following the successful experiment induced by the situation in Galveston after the great disaster of 1900 and the modification of this form by the adoption of the device of the city manager, which has proved so efficient in many of our cities and has resulted in the building up of a highly professional personnel, and the inception of numerous bureaus devoted to research in this field<sup>57</sup>—all these are achievements that mark the adaptability of the American system to meet social and economic change. Hand in hand with these movements has come the development of

civil service, still imperfect and subject to the vicissitudes of party control, but accepted in principle as essential to efficient local government. Of late years, the use of *ad hoc* authorities, with or without the power to tax, has proved to be in many instances the most practical method for accomplishing local improvements and for solving some of the problems of the metropolitan area.<sup>58</sup>

So, too, the flexibility of the American system has enabled our states to try out experiments in local municipal organization impossible under the English system. The dominating political principle of home rule in local government has of late years realized itself in numerous amendments in the state constitutions giving the local municipal electorates the power to frame their own charters and to include therein municipal powers "not inconsistent with the constitution and the general laws of the state."<sup>59</sup> Such powers, therefore, are subject to resumption by the state legislature whenever in its discretion it decides that the entire field should be covered by general law. This leaves the area of constitutional home rule to be determined primarily by the local electorate in fields of governmental action not yet covered by general law, but always subject to curtailment by the legislature when centralized regulation in the particular field is required by public necessities. Such is the system in California, perhaps the most progressive of our states in the technique of local government, where the localities enjoy the maximum of home rule consistent with subordination to legislation of the state.<sup>60</sup> Constitutional grants of police powers directly to the municipalities, as exemplified in the Ohio constitution, have been found to raise in some instances conflicts with the concurrent control still necessarily left in the state legislatures.<sup>61</sup> In other states, as in New York, the constitutional home-rule power is practically confined to matters of local governmental organization, and the distribution of the exercise of powers conferred by the legislatures among

the various local agencies thus created.<sup>63</sup> Within the limits of the New York and California systems, in which the ultimate control is still with the legislature, the home-rule movement in the United States may be said to be constantly gaining ground and may become generally accepted in most of the other states. As so modified, the system avoids the impasse of creating *imperia in imperio* and goes further than any other form of local-state organization in reconciling the political doctrine of an inherent right to home rule with the practical governmental requirement of subordinating all local agencies to the central state authority.<sup>65</sup>

A great deal of the legislation bearing upon the creation and powers of municipalities, both constitutional and statutory, has been ill conceived and crudely fashioned. Progress has been largely by trial and error. It has time and again been saved from wreckage by the work of the courts in interpreting and applying the statutes and keeping the administration within constitutional bounds. The written constitution and the assumption of judicial control over legislative acts early made the doctrine of *ultra vires* a commonplace principle of our public law.<sup>64</sup> So, also, when the question of the validity of the operative acts of creation of the corporation arose, either through the violation of constitutional limitations or through the failure of the local officers to follow the provisions of empowering statutes, the courts extended the ancient doctrine of *de facto* officers to meet the practical difficulties that called for solution.<sup>65</sup> In the construction of constitutional limitations upon the power to incur indebtedness, the prohibition was held to apply only to voluntary obligations, assumed by the corporation in question, that might have to be met by a resort to the taxing power,<sup>66</sup> thus affording an opportunity for relief from the restriction by the creation of overlapping corporations with differing functions or leaving the field open for the self-liquidating enterprises when duly authorized



by statute.<sup>67</sup> The principles of quasi-contract were worked out so as to conform to the general law and, at the same time, to uphold mandatory limitations imposed by the state legislature upon the local power to contract.<sup>68</sup> The rigidity of the constitutional requirement of incorporation by general law was relaxed through the approval of reasonable classifications of municipalities for this purpose.<sup>69</sup>

We have already spoken of the service rendered by the courts in interpreting and applying constitutional limitations upon the control of the legislature over municipal corporations. No less noteworthy has been their service in defining the limits of the delegated powers of municipalities in the construction of their charters and in the protection of individual rights. We have seen that the so-called strict construction of delegated powers was well recognized a century ago, but that the control of the courts over legislation suffered an eclipse from 1835 down to the time of the Civil War. Its reassertion came slowly and it was not until after the adoption of the Fourteenth Amendment that the state courts again began to apply the provisions of their bills of rights to hold the legislative fiat in check. This was done not only by extending the scope of the prerogative remedies of prohibition<sup>70</sup> and certiorari<sup>71</sup> but by giving to the taxpayer the right, concurrent with that of the public authorities, of resorting to a court of equity to enforce the constitutional and statutory limitations upon municipal powers and to prevent the unlawful dissipation of public funds.<sup>72</sup> The broadening of the taxpayer's equitable action from a personal to a representative basis was contemporaneous with a similar development of the judicial control in England.<sup>73</sup> In both jurisdictions it marked the final acceptance of the doctrine that all public funds are held in trust for the residents of the local corporation, and has become the most common and the most potent legal remedy in conserving the resources of

our local authorities and in restraining the unwarranted extension of municipal power. Quite generally this jurisdiction was assumed by the courts of their own volition, although in a few states, as in New York and Massachusetts, it had to await the action of the state legislature.<sup>74</sup> It may be said that today in every American jurisdiction this equitable remedy is now available either by common law or by statute.<sup>75</sup>

In this extension of judicial control the federal courts have played no small part by making vital the powers given them in the application of the provisions of the Fourteenth Amendment. Jurisdiction to review state legislation affecting individual rights guaranteed by the Amendment began to be exercised by the Supreme Court between 1870 and 1890.<sup>76</sup> Since that time the Court, through a multitude of decisions, has worked out the scope of the police power of the states in relation to personal rights as affected not only by statutes but by municipal ordinances and administrative regulations as well. While under its decisions the expanding nature of the police power as determined by state legislation has been fully recognized, individual rights have come to be as fully protected against the acts of municipal authorities by the federal as by our state courts. In this particular field the Supreme Court has acted as the stabilizing and unifying force of our municipal law.<sup>77</sup> But we must bear in mind that only as the contract clause and the Fourteenth Amendment affect the rights of private persons does the Federal Constitution limit the powers of the states over their local governmental agencies.<sup>78</sup> Each of the several states is left absolutely free to set up any kind of local government it may desire, to control the administration of municipal property, to resume any powers heretofore conferred,<sup>79</sup> and even to abolish these existing rights, all of which powers may be exercised by the state legislature, subject only to the limitations of its own constitution.

Of the reforms attributed by English publicists to the Municipal Corporations Act of 1835, that of substituting a popular basis in the people residing within the corporate limits for the older, more limited corporate membership had from the first been recognized as a fundamental principle of New England town law.<sup>80</sup> This principle had already been fully accepted as the basis for the organization of all subordinate local governmental corporations in the other states, which had set up county and township systems, and had from early days been applied to smaller municipal corporations, such as the villages of New York and the boroughs of Pennsylvania.<sup>81</sup> The early charters quite generally had in terms constituted the residents of a city the corporate body so that the closed corporation of certain named persons and their successors,<sup>82</sup> one of the existing evils of the English boroughs, was never a problem in this country subsequent to the Revolution.<sup>83</sup>

So, too, regarding the analogous question of popular suffrage; while in 1835 there still remained vestiges of the theory so strongly advocated by Kent<sup>84</sup>—that the ownership of property or the payment of taxes was the only sound basis of the elective franchise—the democratic movement toward universal manhood suffrage as a political right rather than as a legal privilege had already succeeded in New York and in most of the other states. The full triumph of this principle in our constitutional law had to await the growing power of democracy during the years immediately succeeding and may be said to have culminated only upon the adoption of the Fourteenth and Nineteenth Amendments to the Federal Constitution. For all practical purposes, however, we may say that from 1835 our municipal franchise has been upon the same broad basis as the state electorate and that since the advent of woman suffrage it has been the broadest to be found anywhere in the world.<sup>85</sup> Whether universal suffrage in municipal

elections tells for better local government is today a purely academic question, but it is worth noting that with the more difficult and the more complicated problems of local government with which we have had to deal since women have been accorded equal political privileges, major political scandals, so prevalent in our city governments in the earlier era, have, except perhaps for the evils of local extravagance, well nigh if not entirely disappeared.<sup>86</sup>

We have already noted the general acceptance of the legal principle in 1835 that the municipal corporation is the creature of the state and that it owes its creation and continued existence, its privileges and its powers, to the will of the state as expressed in the acts of the legislature. Upon only one point was there any doubt at that time regarding the omnipotence of the state, and that was upon the extent of legislative control over the property of the municipal corporation acquired and used for corporate as distinguished from governmental purposes.

In England the declaration by Parliament in 1835 that all the property held by the corporate boroughs should henceforth be held in trust for the welfare of their inhabitants effectuated a revolutionary reform in the law. In the discussion in the House of Lords in 1828 over the Corporate Funds Bill, aimed at the misconduct of the corporations of Northampton and Leicester in spending large sums from the corporate treasury to secure the election of favored candidates to Parliament, Lord Eldon had stated that under the law of England borough property not clearly held in trust was subject to control by the governing body as fully as similar property held by private individuals.<sup>87</sup> This crying defect in the existing law gave force to the reform program successfully carried through by the Municipal Corporations Act of 1835.

In the various states at this time the doctrine that all property

of the municipal corporation was held in trust for the benefit of its inhabitants had never been questioned.<sup>88</sup> But a serious constitutional question had already been mooted: whether or not the omnipotence of the legislature over municipal affairs extended so far as to deprive the corporation of property which had been granted to it by the state to be used for its own purposes as a source of local revenue. It was not until after the controversy that raged about the decision of the Supreme Court construing the contract clause of the Federal Constitution in the *Dartmouth College* case had divided our leading constitutional lawyers into two hostile camps that this question came to the fore for discussion. In April of 1835 the Common Council of the City of New York passed a resolution requesting Chancellor Kent to write a commentary upon the charter of the city. In the course of the treatise Kent was called upon to discuss the nature of the rights of the city in the exclusive ferry franchises that had been granted to it during colonial days. Kent did not hesitate to take the position that not only the grant of specific ferry privileges but also the grant of the right to establish other ferries as confirmed by the Montgomery charter of 1708 were "corporate franchises, partaking of the nature of private property." He believed that the old English doctrine that a prerogative charter was in the nature of a contract still persisted and that property rights of the city were protected by the contract clause of the Federal Constitution equally with those of private citizens.<sup>89</sup>

The view of Kent that the doctrine of *Dartmouth College v. Woodward*<sup>90</sup> would be stretched to protect the property rights of municipal corporations ignored the caveat of the Supreme Court that the decision was not applicable to public corporations. It was many years, however, before that Court was called upon to decide definitely that neither their existence nor their privileges nor even their rights acquired by contract from private persons

were protected by the Federal Constitution against legislative mandate.<sup>92</sup> It is true that in the *New Orleans* and *Covington* cases grants directly from the state were involved and that the court intimated that it was not passing upon the status of rights acquired in their proprietary capacity, but later, in *Hunter v. Pittsburgh*,<sup>93</sup> the court declared that a distinction between "governmental" and "proprietary" functions of municipal corporation had never been recognized by it, and in *Trenton v. New Jersey*,<sup>94</sup> the court finally put to rest the doctrine that the Federal Constitution limited in any way the control of the states over the rights acquired by its local agencies.

Under the American system, therefore, except so far as the violation of the rights of private persons is brought into question, the control over local governmental agencies is entirely a matter of state policy. While the doctrine of Kent from time to time has found some support in state decisions,<sup>95</sup> the state courts have come to realize that all municipal functions in the final analysis are governmental and to concede that the local corporation's trusteeship of any property devoted to a public use, except as limited by the constitution of the individual state, may be transferred at will by the state legislature to some other similar agency.<sup>96</sup> The state government itself, of course, may assume control of municipal functions and take over the property devoted to them, except so far as the power of the state legislatures has been limited by the so-called home-rule amendments. Against the sovereign authority of the state as exercised by process of constitutional amendment, no local governmental unit can claim any protection whatsoever under the Federal Constitution.<sup>96</sup>

English publicists also trace to the Reform Act of 1835 the source of the administrative control over local governmental finance to which they ascribe the financial standing of their municipalities during the past fifty years. It is a matter of common

knowledge that the obligations of British municipalities rank with those of the Bank of England, that their legality is never questioned, and that they are so sought for investment that no municipality would think of selling an issue of its securities and seldom of paying any fee for assistance in its distribution. The administrative control over British local financing developed naturally as the central government was called upon to supplement the local rates with subventions to make possible the construction of permanent improvements required by the modern expansion of municipal functions.<sup>97</sup> As a condition to the granting of the necessary aid Parliament assumed a permanent control through central administrative agencies, such as the Local Government Board, over the exercise by local subdivisions of the power to embark on new enterprises calling for capital investment, and insisted upon a continuous rigid supervision of municipal book-keeping applicable not only to the numerous local authorities set up for special ends but to the boroughs and cities as well.<sup>98</sup> Inherent in this system of administrative rather than of legislative control was the building up of a permanent professional personnel to which English local government is indebted for its high standard of efficiency.

In contrast with the development of a unified system of administrative control over municipal enterprises, the record of American local government during the past century seems to suffer. While it is true that within the last fifty years state administrative supervision over municipal finance has taken great strides, the centrifugal force of local independence in the exercise of all locally delegated powers has been sufficient to check any condition approximating that realized in England. In a very few states, however, a similar general supervision has been adopted; for the most part such supervision as exists is exercised by divided authorities dealing with taxation, accounts and budgets, and

indebtedness. In 1928 only some thirty-five states had set up a supervision by inspection and audit over local accounts; in some twenty states, uniform systems of municipal accounting had been prescribed.<sup>99</sup> As to central administrative control over the power to incur indebtedness, in the relatively few states in which it obtains, its exercise is left largely to the initiative of local taxpayers.<sup>100</sup> In short, not only do we nowhere have a drastic control over municipal expenditures by state supervisory authorities, but little evidence of uniformity in this respect can be found among the various states. The results may not be satisfactory, municipal defaults in a time of financial crisis may be astounding,<sup>101</sup> but in certain aspects the picture is not without its compensating advantages. American cities have not lagged, except in the matter of municipal housing, behind European municipalities in their extension of services to their inhabitants; the tempo of their growth in number and population has been far more rapid; and the correspondingly greater requirements for increasing municipal expenditures have for the most part been adequately met.

Here again the stabilizing force of the federal courts in applying the contract clause of the Constitution has been noteworthy. Beginning as early as 1858, the Supreme Court has handed down a series of epoch-making decisions protecting the rights of holders of municipal bonds and thus shoring up the weakened structure of municipal credit.<sup>102</sup> The limitation of the bondholder to strictly legal remedies<sup>103</sup> and the practically total exemption of municipal property from execution<sup>104</sup> have left the enforcement of creditors' remedies incomplete and have led to the enactment of various state statutes aimed at the protection of creditors' rights or the adjustment of their claims. No less than twenty states in 1931-1932 enacted legislation looking to the improvement of local financial methods with a more or less direct control by some state administrative board. The resilience of local credit, aided by



emergency legislation and supplemented by state subsidies within the years immediately past, is evidence of the vitality of American local government.<sup>105</sup>

The contest for the preservation of local home rule in America, as we have seen, has survived the revolutionary economic and social changes of the past century. A legislative control that could be fashioned by the people of each locality was well suited to the rising tide of democracy from 1835 to the time of the Civil War. The necessary curb upon special legislation by state constitutional amendments which followed was made elastic by the construction put upon them by the courts so as to permit legislation adapted to the varying needs of municipalities whose essential interests were distinct. The later endeavors to restrict local indebtedness by constitutional limitations either by fixing a ratio to taxable assessments or by requiring local referenda served as a check upon municipal extravagance from their inception in 1870 up to the end of the nineteenth century.<sup>106</sup> As extensions of enterprises calling for capital outlay demanded an outlet, the device of overlapping municipalities and improvement districts was freely applied, and the technique of the special assessment was developed to meet the exigencies of expanding communities.

This adaptability of the control by legislation rather than through central administrative agencies can be seen in the program of subventions and loans to municipalities by the federal government through the expedient of the Public Works Administration in the past three years, during which period no less than \$300,000,000 of federal funds have been loaned to the municipalities of the country for financing the extension of public works.<sup>107</sup> To a large degree, these loans, whether made directly to the municipalities or to independent nontaxing authorities set up by state legislation, have been secured by a pledge of the revenues of income-producing public utilities, including waterworks, light-

ing and power, highways, bridges and tunnels, and even sewer systems. As these loans were outside the purview of state constitutional limitations upon local indebtedness and taxation, legislation granting or supplementing the power of the local subdivisions to incur obligations in this manner was readily obtained.<sup>108</sup> It seems quite doubtful if the English system of administrative control would be flexible enough to meet such a crisis. But the answer is that under that system no such crisis could occur. This may be true, and the question arises whether or not our cities are willing to make the sacrifice of the principle of home rule in local affairs in exchange for the more rigid control over municipal finance and municipal enterprise that might ensure them for all times against default or onerous taxation. Fortunately, at this time, while there appears to be a wide swing to the view that our cities may be better off by cultivating the munificence of the federal government rather than by depending upon less attractive state subsidies, the very conditions attached to loans by the federal government is paving the way to the acceptance of a like supervision by the individual state government, as it may have to reassume its position of *paterfamilias* to its needy children. The experience of recent years has driven home the lesson that the state at large as well as each municipality has a vital interest in the credit of all local self-governing units. Whether the federal government will make the approval of a central state administrative board one of the conditions of its continued beneficence or not, the setting up of such a control over local finance would at once ensure greater financial security and make possible a wider scope of municipal home rule. The working out of this reform in such a way as to preserve our local institutions under an efficient state control is the crucial problem in American municipal government to be solved within the immediate future.

## NOTES

<sup>1</sup> For a brief outline of the early history and organization of the boroughs, see the article on Municipal Corporations, 11 ENCYC. SOC. SCI. (1933) 86. See also SIDNEY AND BEATRICE WEBB, *ENGLISH LOCAL GOVERNMENT* (1922) 479 *et seq.*

<sup>2</sup> 6 HANSARD, *PARLIAMENTARY DEBATES* (1835) 215. The law on this point was consistent with the theory of the prerogative charter which required an acceptance by the corporators and therefore partook of the nature of a private contract, as in the case of private corporations in this country.

<sup>3</sup> This power had existed from the time of the Commonwealth and the limitation had always been subject to judicial interpretation. See WILCOCK, *MUNICIPAL CORPORATIONS* (1827) c. 2.

<sup>4</sup> See *A CENTURY OF MUNICIPAL PROGRESS* (1935), edited by Messrs. Laski, Jennings, and Robson of the University of London; Simey, *The Municipal Corporation 100 Years Ago*, a series of seven articles published in the *MUNICIPAL REVIEW* (Vol. 6, February to October 1935); Local Government Centenary Number of the London Times, December 10, 1935.

<sup>5</sup> For that we must await the work now being undertaken by one of our leading publicists, Dr. Ernest S. Griffith, of the American University, Washington, D. C.

<sup>6</sup> An English edition by Henry Reeve appeared in 1836 and was reviewed by Edward Everett in the *NORTH AMERICAN REVIEW* of July 1836. The first American edition, Reeve's translation with notes by John C. Spencer of New York, subsequently secretary of state under President Tyler, is noted in the October 1838 number of the same magazine. It is worthy of mention that among the authorities consulted by De Tocqueville in his visit to this country was Albert Gallatin, one of the founders of New York University and the first president of its Council.

<sup>7</sup> Adams, Jared Sparks, and Alexis De Tocqueville, *JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE*, 16th series, 580.

<sup>8</sup> The modern idea that towns in Connecticut once possessed inherent rights to local self-government was finally disposed of in *State v. Williams*, 68 Conn. 131 (1896); see also *Webster v. Harwinton*, 32 Conn. 131, 136 (1864). As to the early status of the Rhode Island towns, see *City of Newport v. Horton*, 22 R. I. 196 (1900); of Massachusetts towns, see *Chandler v. Boston*, 112 Mass. 200 (1873).

<sup>9</sup> As to the nature of these limitations enforced by the courts of Connecticut, see *Hayden v. Noyes*, 6 Conn. 391 (1849), *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 7 Sup. Ct. 865 (1887). Of the origin of the Massachusetts towns, see the monographic note by Horace Gray, Jr., to *Commonwealth v. City of Roxbury*, 75 Mass. 451, 510 (1857).

<sup>10</sup> Boston was first incorporated as a city in 1822.

<sup>11</sup> WEBB, *op. cit. supra* note 1, c. 17. The author's estimates on population were drawn entirely from secondary sources. He was led to believe that Philadelphia contained in 1830 a population of 161,000, although the census figures of 1830 give 93,665. His estimate of New York was much closer, 202,000 compared with the census figures of 197,112.

<sup>12</sup> *The Predictions of Hamilton and de Tocqueville*. *JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE*, 5th series, 388.

<sup>13</sup> According to the *Daily National Intelligencer* of Dec. 16, 1935, the President's message was carried from Washington to Boston in twenty-six hours and fifty minutes,

an average of sixteen and two-third miles per hour. By the report of the postmaster general of Dec. 1, 1935 (Albany Argus, Dec. 19, 1935), the time by railroad between Washington and Baltimore was two and one-half hours, between Baltimore and Philadelphia by rail and steamboat nine hours; this latter time to be reduced to six hours upon completion of through rail connections. The time from Philadelphia to New York by rail and steamboat is given as eight hours.

<sup>14</sup> The Dartmouth College Case (Dartmouth College v. Woodward, 4 Wheat. 518) had been decided in 1819.

<sup>15</sup> For résumé see: 2 VON HOLST, CONSTITUTIONAL HISTORY OF THE UNITED STATES (1881) 179 *et seq.*

<sup>16</sup> The Boston Enquirer of July 24, 1835, states upon the authority of Bicknel's REPORTER that the banking capital of the Union is \$219,250,549, of which New York has \$31,481,460. No premonition of the credit panic of 1837 was apparent in 1835.

<sup>17</sup> John Adams Dix in his SKETCH OF THE RESOURCES OF THE CITY OF NEW YORK, published in 1827, states that there are thirty-three fire-insurance companies with gross capital of \$12,450,000 and eleven marine-insurance companies with capital of \$5,000,000. After the great fire of 1835, a statute was enacted by which the city was authorized to purchase bonds of fire-insurance companies, secured by mortgages, up to \$6,000,000.

<sup>18</sup> The census of 1830 reported some sixteen cities with a population in excess of 10,000, of which New York was easily first with a rating of 197,112, followed by Baltimore, 80,620, Philadelphia 80,462, Boston 61,392, New Orleans 34,438, Charleston 30,289, Cincinnati 24,831, Albany 24,222, Brooklyn 20,535. The next decade was to see Brooklyn double in population and New York increase by fifty per cent, far outstripping its rivals on the Atlantic seaboard, only one of which, Baltimore, had passed the century mark by 1840. In the same decade Baltimore and Philadelphia added thirty per cent. The most marvelous growth, of course, was in the frontier cities, New Orleans tripling its population and cities like Detroit and Mobile multiplying by four times. Cleveland in 1835 had a population of 5,080, an increase from 500 in 1825 (Morning Courier and New York Enquirer Dec. 8, 1835). Chicago in 1835 was reported to have a population of 4,000 having doubled its population and quadrupled its trade in one year (Buffalo Commercial Advertiser, Oct. 22, 1935).

<sup>19</sup> The scourge of Asiatic cholera caused no less than three thousand fatalities in 1832 and recurred in 1834. 1 LESLIE, HISTORY OF GREATER NEW YORK (1893) 299. Croton water was not available until 1842; *id.* at 310.

<sup>20</sup> The great fire of December 1835, which entailed a loss of from twenty to thirty millions and ruined many of the fire-insurance companies, led the aldermen to petition the legislature for authority to incur a bonded debt of \$6,000,000 to purchase real-estate mortgages owned by these companies. This unfortunate affair led to letters to the press, suggesting that "our fire department is suited to a community much more contracted than ours." Journal of Commerce, Dec. 17, 18, 19, 20, 21, 1835.

<sup>21</sup> The New York Gas Light Company had been incorporated in 1823 and in 1825 it began to pipe the streets below Canal Street. In 1830 the Manhattan Gas Light Company was incorporated and given the franchise to distribute gas north of Canal Street. 3 MEMORIAL HISTORY OF NEW YORK CITY (1893) 331, 333.

<sup>22</sup> Niles Weekly Register, Nov. 7, 1835, based on a recently completed city census, which also noted 10,713 horses, 11,879 hogs, and 4,062 sheep and goats.

<sup>23</sup> *Id.*, March 28, 1935.

<sup>24</sup> The Evening Post, May 27, 1835. The figures given are funded debt \$418,500; tax

anticipatory loans \$326,534, a reduction in the total debt for the year of \$91,309. The comptroller estimated that with the requirements for the Croton Water project the disbursements for 1835 would be near to \$3,000,000. He also notes that offers of 110 for outstanding five per cent city stock had not met with any response.

<sup>25</sup> Most of the post-Revolutionary constitutions were silent on the question of local government. That of New Jersey guaranteed the former right of local elections (Constitution of 1776, art. XIV); article XXXVII of the Declaration of Rights of the Maryland Constitution of 1776 assured to the city of Annapolis its existing rights and privileges, but subject to alterations by subsequent legislatures. The constitution of Louisiana of 1812 (art. VI, §23) guaranteed the citizens of New Orleans the right of appointing local officers "pursuant to the mode of election which shall be prescribed by the Legislature."

<sup>26</sup> This power was implied from the principle of the separation of powers of government exemplified in the early constitutions. In the South Carolina Constitution, art. XXXVIII, parishes were to be incorporated by the legislature, and by § VIII of Chapter II of the Vermont Constitution of 1777, the legislature was specifically given power to constitute towns, boroughs, cities, and counties.

<sup>27</sup> This limitation was expressly required by the enabling amendment to the state constitution adopted 1821. Mass. Const. (1780), Amend. II.

<sup>28</sup> C. 110 LAWS OF MASSACHUSETTS (1818-1822). The entire charter is printed in REED AND WEBBINK, DOCUMENTS ILLUSTRATIVE OF AMERICAN MUNICIPAL GOVERNMENT (1926), 93-102. It may be noted that the requirement of the consent of the inhabitants in town meeting was also required by the constitutional amendment of 1821, *op. cit. supra* note 1.

<sup>29</sup> Charter of 1789, § XV; REED AND WEBBINK, *op. cit. supra* note 28, at 60, 63.

<sup>30</sup> In 1835 there were twelve wards.

<sup>31</sup> The Baltimore Charter of 1796 is printed in full in REED AND WEBBINK, *op. cit. supra* note 28, at 73-80.

<sup>32</sup> New York had practically abolished the property qualifications for electors by Article II of the constitution of 1821. By Amend. VII, adopted in 1845, property qualifications for office were forbidden.

<sup>33</sup> KENT, CHARTER OF THE CITY OF NEW YORK (1836) 126. By a constitutional amendment ratified in 1833, this section was amended by adding: "Except in the city of New York, in which city the mayor shall be chosen annually by the electors thereof qualified to vote for the other charter officers of the said city, and at the time of the election of such officers." 5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS (1909) 2652.

<sup>34</sup> Art. IV, §10. Up to the time of this amendment all of what may be called the county officers, the recorder, city clerk, health officers, commissioners of excise, harbor inspectors, and many other local officers were appointed by the same body. See *Report of Secretary Yates in Proceedings of the Convention of 1821*, 367.

<sup>35</sup> §14.

<sup>36</sup> Laws of 1913, c. 86, § 274.

<sup>37</sup> Code of Town Laws 1 R.S. c. 11, pp. 329-357; Code of Counties 1 R.S. c. 12, pp. 357-378. The editors were two eminent lawyers, Mr. Benjamin T. Butler of New York, the founder of the School of Law of New York University, and Mr. John C. Spencer of Canandaigua, the friend of De Tocqueville.

<sup>38</sup> 1 N. Y. REV. STAT. (1836) 77. A general law providing for the incorporation of

villages and defining their powers was enacted in 1847: N. Y. GEN. STAT. (1849) 185 (Blatchford ed. 1852) 1043.

<sup>39</sup> Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 517, 694, 695, 659-664 (1819); Bradford v. Cary, 5 Me. (5 Greenl.) 339 (1828); Day v. Stateson, 8 Me. (8 Greenl.) 365 (1832); Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58 (1842); Hampshire v. Franklin, 16 Mass. 76 (1819); People v. Morris, 13 Wend. 325 (1835); 2 KENT, COMM. 245.

<sup>40</sup> Higby v. Bunce, 10 Conn. 436 (1835).

<sup>41</sup> State v. Mobile, 5 Porter 279 (Ala. 1837); City of Baltimore v. Hughes, 1 Gill & Johnson 480 (Md. 1829); Stetson v. Kempton, 13 Mass. 272 (1816); People v. Albany, 11 Wend. 539 (N.Y. 1834); Hoeffick v. Snyder, 2 Rawle 125 (Pa. 1828).

<sup>42</sup> Lonfear v. Mayor, 4 La. 97 (1832); Parsons v. Goshen, 28 Mass. 396 (1831); People v. Albany, 11 Wend. 539 (N.Y. 1834); Town of Marietta v. Fearing, 4 Ohio (4 Ham.) 427 (1831) (ordinance annulled by subsequent legislative act); Bank of Chillicothe v. Chillicothe, 7 Ohio, Part II, 31 (1836); Barter v. Commonwealth, 3 Penrose and Watts 253 (Pa. 1831).

<sup>43</sup> Milne v. Davidson, 5 Martin, N.S. 409 (La. 1827); Vandine, Petitioner, 6 Pick. 187 (Mass. 1828); Austin v. Murray, 33 Mass. 121 (1834); Paxson v. Sweet, 13 N.J.L. 196 (1832); Dunham v. Trustees of Rochester, 5 Cowen 462 (N.Y. 1826); Commr's of Plymouth v. Pettijohn, 15 N.C. 506 (1834).

<sup>44</sup> Towne v. Lee, 8 Martin, N.S. 548 (La. 1830); Commonwealth v. Worcester, 20 Mass. 462 (1826); Goddard, Petitioner, 16 Pick. 504 (Mass. 1835); Village of Buffalo v. Webster, 10 Wend. 99 (N.Y. 1833); Memphis v. Enright, 6 Yerger 497 (Tenn. 1834); see *supra* note 1.

<sup>45</sup> Pritchard v. Georgetown, Fed. Cas. No. 11,437 (2 Cranch. 191) (1819); Baumgard v. Mayor, 9 La. 119 (1836); Goodloe v. City of Cincinnati, 4 Ohio 500 (1831); cf. Hamilton County v. Mighels, 7 Ohio St. 109 (1837). Generally, however, no liability was incurred for the negligent acts of their officers and agents when engaged in the performance of governmental duties required by state law, unless such liability was expressly imposed by statute. Mower v. Leicester, 9 Mass. 247 (1812). See also Ward v. County of Hartford, 12 Conn. 404 (1838).

<sup>46</sup> Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517, 694 (1819).

<sup>47</sup> Trustees of the New Gloucester School Fund v. Bradbury, 11 Me. 118 (1836); Presbyterian Church v. City of New York, 5 Cowen 538 (N.Y. 1826); Coates v. Mayor etc. of New York, 7 Cowen 604 (N.Y. 1828). See Gozzler v. Corp. of Georgetown, 19 U.S. (6 Wheat.) 593 (1821) (*per* Marshall, C. J.).

<sup>48</sup> For a study of this problem, see GOODNOW, MUNICIPAL HOME RULE (1895). As to the effect of this distinction on municipal liability, see Seasongood, *Objections to the Governmental or Proprietary Test* (1936) 22 VA. L. REV. 910; Borchard, *Government Liability in Tort* (1924-1925) 34 YALE L. J. 129, 229 (1926-1927), 36 YALE L. J. 1, 757, 1039 (1928), 28 COL. L. REV. 577, 734.

<sup>49</sup> Mayor City of New York v. Milne, 36 U.S. (11 Pet.) 102 (1837); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); Briscoe v. Bank of the Commonwealth of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

<sup>50</sup> If a power has been granted by general law as required by the state constitution irregularities in its exercise may be cured by special act: DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §68; McQUILLIN, LAW OF MUNICIPAL CORPORATIONS (2d ed. 1928)

§§159, 176; COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) §§770-792; Read v. Platismouth, 107 U.S. 568 (1882); Charlotte Harbor v. Wells, 260 U.S. 8, 43 Sup. Ct. 3 (1922); Taft v. Buffalo, 82 N.Y. 204 (1880).

<sup>51</sup> HILLHOUSE, MUNICIPAL BONDS (1936) c. 7.

<sup>52</sup> By 1880, the gross debts of local subdivisions exceeded \$900,000,000, as follows: cities and incorporated towns, \$766,554,343; counties, \$125,621,555; townships, \$31,909,645; school districts, \$17,535,411—COMPENDIUM OF TENTH CENSUS (1884) Part II, 1571.

<sup>53</sup> The constitutional provisions are as follows: Arizona (1910) art. IV, Subd. 2, §19 (17); California (1879) art. XI, §6; Florida (1865) art. IV, §20; Illinois (1870) art. IV, §22; Iowa (1857) art. III, §30; Kansas (1859) art. XII, §§1, 5; Nebraska (1875) art. III, §18, art. XI, §5; North Dakota (1889) art. VI, §130; Ohio (1851) art. XIII, §6; Oklahoma (1907) art. XVIII, §1; South Carolina (1895) art. VIII, §1; South Dakota (1889) art. X, §1; Utah (1895) art. XI, §5; Washington (1889) art. XI, §10; Wyoming (1889) art. XIII, §1.

In some of the constitutions of the same period the legislature was in terms allowed to create corporations for municipal purposes by special act: California (1849) art. IV, §31; Illinois (1847) art. X, §1; Louisiana (1864) Tit. VII, art. CXXI; Michigan (1850) art. XV, §1; Minnesota (1857) art. X, §2; Missouri (1865) art. VIII, §5; Nevada (1864) art. VIII, §1; New York (1846) art. VIII, §1; Oregon (1857) art. XI, §2. The Missouri constitution of 1865, art. VIII, §5, provided that no municipal corporation shall be created by special act, except cities of at least five thousand population, the special act to be approved by a vote of the inhabitants.

<sup>54</sup> The present constitutional limitations upon indebtedness are: ALABAMA CONST. §§225, 226; ARIZONA CONST. art. IX, §8; ARKANSAS CONST. Amend. No. 11; CALIF. CONST. art. XI, §18; COLO. CONST. art. XI, §8; FLO. CONST. art. XII, §17; GA. CONST. art. VII, §7; ILL. CONST. art. 9, §12; IND. CONST. art. 13, §1; IOWA CONST. art. XI, §3; KENTUCKY CONST. §§157, 158; LA. CONST. art. 14, §24; ME. CONST. art. 23, 34; MICH. CONST. art. VIII, §24; MISSOURI CONST. art. 10, §12; MONT. CONST. art. XIII, §6; NEW MEX. CONST. art. 9, §13; N. Y. CONST. art. VIII, §10; N. C. CONST. art. VII, §7; N. D. CONST. art. 35, §183; OKLA. CONST. art. 10, §26; PA. CONST. art. 9, §§8, 15; S. C. CONST. art. 8, §7; S. D. CONST. art. XIII, §§3, 4; TEX. CONST. art. XI, §§5, 7; UTAH CONST. art. XIV, §§3, 4; VA. CONST. art. 127; WASH. CONST. art. 8, §6; W. VA. CONST. art. 10, §8; WISC. CONST. art. XI, §3; WYO. CONST. art. XVI, §§4, 5.

<sup>55</sup> These are as follows: ALA. CONST. (1875) art. IV, §55; ARIZONA CONST. (1910) art. IX, §7; ARK. CONST. (1874) art. XII, §5; art. XVI, §1; CALIF. CONST. (1879) art. IV, §31; CONN. CONST. (1818) Amendment XXV (1877); DELA. CONST. (1897) art. VIII, §8; GA. CONST. (1877) art. VII, §6, ¶1; IDAHO CONST. (1889) art. VIII, §4, art. XII, §4; ILL. CONST. (1870) Amendment separately submitted; LA. CONST. (1879) art. 56, 57; MISS. CONST. (1868) art. XII, §14; MISSOURI CONST. (1865) art. XI, §14; MONT. CONST. (1889) art. XIII, §1; N. MEX. CONST. (1912) art. IX, §14; N. D. CONST. (1889) art. XII, §185; ORE. CONST. (1857) art. XI, §9; S. D. CONST. (1889) art. XIII, §1; TEX. CONST. (1876) art. III, §52, art. XI, §3.

In three states aid to other municipalities has also been prohibited: CALIF. CONST. (1879) art. IV, §31; LA. CONST. (1876) art. 56; N. MEX. CONST. (1912) art. IX, §§14, 15.

<sup>56</sup> It is estimated that the number of local governmental units in the United States exceeds 175,000; single states, as Kansas and Minnesota, have more than 10,000. Anderson, *The Units of Local Government in the United States* (Publication No. 42, Public Administration Service, 1934).

<sup>57</sup> In 1934, of the 310 cities with a population in excess of 30,000, eighty-one had adopted the commission plan and sixty-nine had city managers; the remaining one hundred sixty still retained some form of the mayor-council type of organization. Municipal Year Book, 1934, pp. 101-102. For the progress in civil service reform during the period, see MOSHER AND KINGSLEY, *PUBLIC PERSONNEL ADMINISTRATION* (1936) c. II.

<sup>58</sup> See STUBENSKI, *THE GOVERNMENT OF METROPOLITAN AREAS IN UNITED STATES* (1930); LEPAWEKY, *METROPOLITAN DISTRICTS, THE MUNICIPAL YEAR BOOK* (1935) 128; Fuchs, *Regional Agencies for Metropolitan Areas* (1936) 12 WASH. U. L. REV. 64.

<sup>59</sup> The states having home-rule provisions in their constitutions are: Arizona [CONST. (1912) art. XIII, §§2, 3], California [CONST. (1879, as am'd 1932) art. XI, §§7-½ (a), 8, 8-½], Colorado [CONST. (1876, as am'd to 1933) art. XX, §§4, 5, 6], Maryland [CONST. (1867, as am'd to 1934) art. XI-A], Michigan [CONST. (1908) art. VIII, §21], Minnesota [CONST. (1896, as am'd 1898) art. IV, §36], Missouri [CONST. (1875, as am'd to 1935) art. IV, §§16, 17, 20, 21, 22, 23], Nebraska [CONST. 1875, as am'd 1920) art. XI, §§2-5], New York [CONST. (1895, as am'd 1924, 1928) art. XII, §§1-8], Ohio [CONST. 1851, as am'd 1912) art. XVIII, §§7-9], Oklahoma [CONST. (1907) art. XVIII, §§3(a), 3(b), 4(a), 4(e)], Oregon [CONST. (1859, as am'd 1910) art. XI, §2], Pennsylvania [CONST. (1873, as am'd 1922) art. XV, §1], Texas [CONST. (1876) art. XI, §5], Utah [CONST. (1895, as am'd 1932) art. XI, §5], Washington [CONST. (1889, as of 1935) art. XI, §10], and Wisconsin [CONST. (1848 as am'd 1924) art. XI, §3].

<sup>60</sup> *Ex parte Daniels*, 183 Cal. 636, 192 Pac. 442 (1920). See also *Tremagne v. St. Louis*, 320 Mo. 120, 6 S.W. (2d) 935 (1928).

<sup>61</sup> *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N.E. 114 (1917). But see *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929).

<sup>62</sup> *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929).

<sup>63</sup> On the general subject of constitutional home-rule, see: MCGOLDRICK, *LAW AND PRACTICE OF MUNICIPAL HOME RULE* (1932); MUNRO, *Home Rule*, 7 ENCYC. SOC. SCI. 434-36 (1932); *What Municipal Home Rule Means Today*, 21 NAT. MUN. REV. (a series of ten articles by leading authorities in the several states, 1932).

<sup>64</sup> *March v. Fulton County*, 77 U.S. (10 Wall.) 676 (1870); *Zottman v. San Francisco*, 20 Cal. 96 (1860); *Clark v. City of Des Moines*, 19 Iowa 99 (1865); *The Mayor, etc. of Baltimore v. Reynolds*, 20 Md. 1 (1862); *Dill v. Inhabitants of Wascham*, 7 Met. 438 (Mass. 1844); *Hague v. City of Philadelphia*, 48 Pa. 527 (1865). See Note (1871) 5 AM. L. REV. 272 discussing the opinion of *Jervis, C. J.*, in *The East Anglian Ry. Co. v. The Eastern Counties Ry. Co.*, 11 C.B. 775, 21 L.J. (N.S.) C.P. 23, 16 Jur. 249 (1851).

<sup>65</sup> See CONSTANTINEAU, *PUBLIC OFFICERS AND THE DE FACTO DOCTRINE* (1910); FIELD, *THE EFFECT OF AN UNCONSTITUTIONAL STATUTE* (1935) c. 3; Tooke, *De Facto Municipal Corporations Under Unconstitutional Statutes* (1928) 37 YALE L. J. 935.

<sup>66</sup> *Oppenheim v. City of Florence*, 239 Ala. 50, 155 So. 859 (1934); *Dept. of Water and Power v. Vroman*, 218 Calif. 206, 22 P. (2d) 698 (1933); *Schnell v. City of Rock Island*, 232 Ill. 89, 83 N.E. 462 (1908); *cf. Joliet v. Alexander*, 194 Ill. 457, 62 N.E. 861 (1902); *State v. City of Neosho*, 203 Mo. 40, 101 S.W. 99 (1907); *Brockenbrough v. Board of City Commissioners*, 134 N.C. 1, 46 S.E. 39 (1903); *Kasch v. Miller*, 105 Ohio St. 281, 135 N.E. 813 (1922); *Kelly v. Merry*, 262 N.Y. 151, 186 N.E. 425 (1933); *Winston v. City of Spokane*, 12 Wash. 524, 41 Pac. 888 (1895). As to the effect of constitutional tax limitations, see Note (1936), 35 MICH. L. REV. 120, 129.

Several earlier cases disapproved of what has come to be known as the "special fund doctrine." See, e.g., *Feil v. Coeur d'Alene*, 23 Idaho 32, 129 Pac. 643 (1912); *Mayor of Baltimore v. Gill*, 31 Md. 375 (1869); *Wilson v. State Water Supply Comm'n*, 84



N.J. Eq. 150, 93 Atl. 732 (1915); *Rodman v. Munson*, 13 Barb. 63, aff'd 13 Barb. 188 (N.Y. 1852); *Newell v. People*, 7 N.Y. 9 (1852); *Lesser v. Warren Borough*, 237 Pa. 501, 85 Atl. 839 (1915).

In general, see Notes (1934) 12 N.Y.U. LAW QUARTERLY REV. 112; (1934) 47 HARV. L. REV. 690.

<sup>67</sup> See Durisch, *Municipal Debt Limits and the Financing of Public Works* (1931), 20 NAT. MUN. REV. 460; THORON, REVENUE BOND FINANCING (U.S. Printing Office, 1936); Foley, *Revenue Financing of Public Enterprises* (1936) 35 MICH. L. REV. 1.

<sup>68</sup> See Tooke, *Quasi-Contractual Liability of Municipal Corporations* (1934) 47 HARV. L. REV. 1143.

<sup>69</sup> *Welker v. Potter*, 18 Ohio St. 85 (1868); *Hermann v. Town of Guttenberg*, 63 N.J.L. 616, 44 Atl. 758 (1899); *Admiral Realty Co. v. New York*, 206 N.Y. 110, 94 N.E. 241 (1912); *Adams v. Beliot*, 105 Wis. 363, 81 N.W. 869 (1900).

<sup>70</sup> DILLON, *op. cit. supra* note 50, §§1047n, 1596; HIGH, EXTRAORDINARY LEGAL REMEDIES (2d ed., 1884) §§782-785; McQUILLIN, *op. cit. supra* note 50, §2680. The English cases are developed in *Rex v. Electric Comm.*, [1924] 1 K.B. 171, and *Rex v. Ministry of Health*, [1929] 1 K.B. 619.

<sup>71</sup> See DILLON, *op. cit. supra* note 50, §§382n, 473n, 484n, 757, 953n, 1047, 1455n, 1457, 1591-1595; McQUILLIN, *op. cit. supra* note 50, §§2746 *et seq.* The remedy by certiorari has been most favored in New Jersey. *Rehill v. East Newark, etc.*, 73 N.J.L. 313, 63 Atl. 81 (1906); *Millville v. Bd. of Education*, 100 N.J. Eq. 162, 134 Atl. 748 (1926).

<sup>72</sup> As to the scope of this action, see 6 McQUILLIN, *op. cit. supra* note 50, §§2747-2768.

<sup>73</sup> See A CENTURY OF MUNICIPAL PROGRESS (1935) c. XVIII, Central Control by W. Ivor Jennings.

<sup>74</sup> *Hale v. Cushman*, 47 Mass. 425 (1843); Mass. Gen. Statutes (1860) c. 18, §79; *Roosevelt v. Draper*, 23 N.Y. 318 (1861); N.Y. Laws of 1872, c. 161.

<sup>75</sup> See 6 McQUILLIN, *op. cit. supra* note 50, c. 52. Note, also, the growing use of the declaratory judgment. BORCHARD, DECLARATORY JUDGMENTS (1934) 549-569. Some thirty-one states at this date had adopted the Declaratory Judgment Act.

<sup>76</sup> For a review of the decisions, see HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (1914) c. XIII.

While as early as 1870 in *Yates v. Milwaukee*, 75 U.S. 505, the Court had passed upon the validity of a municipal ordinance, it was not till 1885 that the application of the Fourteenth Amendment was discussed. See *Barbier v. Connolly*, 113 U.S. 27. The decisions are collected and discussed in WALKER, MUNICIPAL ORDINANCE MAKING (1929) c. IV.

<sup>77</sup> Thus, for example, the decision of the Supreme Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), settled the question mooted in several states whether zoning of land for use came within the constitutional scope of the police power. After that decision, in only three states was it deemed necessary to amend the local constitution, expanding the scope of the legislative power to enact enabling statutes. BASSETT, ZONING (1936) 18, 46.

<sup>78</sup> Even the broad federal bankruptcy power does not extend to local governmental agencies of the states. *Ashton v. Cameron Water Improvement District*, 298 U. S. 513, 56 Sup. Ct. 892 (1936).

<sup>79</sup> *City of Geneseo v. Illinois Northern Utilities Co.*, 363 Ill. 89, 1 N.E. (2d) 392 (1936); *Inspection of Buildings of Falmouth v. General Outdoor Advertising Co.*, 264 Mass. 85, 161 N.E. 899 (1928); *City of Troy v. United Traction Co.*, 202 N.Y. 333, 95 N.E. 759 (1911).

<sup>80</sup> See GARLAND, *NEW ENGLAND TOWN LAW* (1906) Introd.; SLY, *TOWN GOVERNMENT IN MASSACHUSETTS* (1929) cc. II, III, IV. It may be noted, however, that the administration of certain local functions, as education and care of the poor, was often committed to *ad hoc* local corporate bodies. See Opinion of Shaw, C. J., in *Overseers of the Poor v. Sears*, 33 Mass. 59 (1837).

<sup>81</sup> *New York Villages*: Waterford, 17th Sess., c. 36 (1794) (3 Greenleaf, p. 130); Catskill (1806) 33d Sess., c. 15 (2 Webster 281, 382); Jamaica (1797) 20th Sess., c. 81 (3 Greenleaf, p. 463); Cooperstown, originally incorporated as Otsego (1807) (3 Webster 138, 4 Webster 484); Kingston (1797) (2 Kent and Radcliffe 205, 3 Webster 100, 4 Webster 112); Newburgh (1800) (2 Kent and Radcliffe 212, 2 Webster 279, 491, 4 Webster 219).

Towns in New York were also organized on a popular basis at an early date. See, e.g., Act of March 19, 1813, §1 (2 Rev. L. of 1813, Van Ness and Woodworth, p. 125).

*Pennsylvania Boroughs*: A general incorporation law for boroughs, embracing the same principle, was enacted in Pennsylvania on April 1, 1834, Pamphlet Laws, 163. 1 PURDON, *DIGEST* (13th ed.) 477. See also Borough of West Philadelphia, 5 W. & S. 281 (1843). See Pa. Stat. at Large, 1682-1801, XV, 424-426, for the charter of the borough of Huntingdon (1796), which is typical of the earlier borough charters.

<sup>82</sup> The Philadelphia Charter of 1701, granted by William Penn as proprietor and governor of the province of Pennsylvania, was of the close corporation type. See text given in REED and WEBBINK, *op. cit. supra* note 28, at 49-58.

<sup>83</sup> See: Charter of St. Mary's (1667) set forth in full in note to McKim v. Odom, 3 Bland (Md.) 403, 412; Dongan Charter of New York (1686) in Kent's Charter, 10; Philadelphia Charter (1789) in REED and WEBBINK, *op. cit. supra* note 28, at 60-68. I COLONIAL LAWS OF N. Y. (1896) 181 (DONGAN CHARTER OF NEW YORK, 1686); PA. STAT. AT LARGE, 1682-1801, XIII, 193 (Philadelphia Charter of 1789); Mass. L. 1818-1822, c. CX (Boston, 1822); Ill. Laws (1836-37), pp. 50-77 (Chicago Charter, 1837).

<sup>84</sup> COMMENTARIES \*229 note (a).

<sup>85</sup> In England women under thirty years of age may not exercise the franchise.

<sup>86</sup> See comments of Seth Low on the value of universal suffrage in the process of assimilation of foreign elements of the population, 1 BRYCE, *THE AMERICAN COMMONWEALTH* (3d ed. 1894) 665-666.

<sup>87</sup> 19 HANSARD, *PARLIAMENTARY DEBATES* (N. S.) 1747 (July 17, 1828): "Lord Eldon said, he did not mean to vote against this bill because he had voted against the bill of last year, but because he thought it was against the principles of the constitution. No man could doubt, at least no lawyer could doubt, what the law was on the subject. The right of corporations to property which they did not hold in trust, was the same as the right of individuals to private property. He knew this was law in Westminster Hall forty years ago, and he believed it was so to this day. Corporations had a right to dispose of the property they held, not in trust, to any purposes that were legal and not corrupt. The present bill, like the bill of last year, did not purpose to put a stop to any corrupt or illegal practices, but to take a right from all corporations which they had always exercised. If it were carried, every application of corporation funds, such as buying pictures, or giving a

Lord Mayor's dinner, would be illegal. He was sure their lordships would hesitate before they passed a bill, which did not correct an individual abuse, but took from corporations those rights which they held, both by the principles of the law and the constitution."

<sup>88</sup> This necessarily followed from the popular basis of the corporation. See note 81, *supra*.

<sup>89</sup> KENT, *op. cit. supra* note 33, at 233-235. His argument was as follows: "A corporate body is capable of taking the grant of a ferry, or of the right to establish one, and it is a freehold right and as much beyond the reach of a gratuitous legislative resumption, as any other franchise or property held by grant or charter. The ferry franchise is not the grant of political power, strictly speaking, any more than the grant of any other franchise or any other use of property. It certainly is not more so in respect to the right to establish new ferries, than the grant of the old ferry, and that is admitted to be an absolute irrevocable grant in fee. The grant of political power is exclusively a matter of public and general concern, but the ferry grant was for the benefit of the grantees, and the rents, issues and profits were given exclusively to the inhabitants of the city. The inhabitants in their aggregate corporate capacity, have as vested an interest in the entire grant of the old ferry, and of the right to establish others, as they have individually in any government grant of lands, tenements, and hereditaments. Nor can such a grant be lawfully revoked, any more than the grant of any other hereditament, except for non-user or mis-user, to be ascertained by a judicial proceeding. . . ."

<sup>90</sup> 17 U.S. (4 Wheat.) 517 (1819).

<sup>91</sup> *East Hartford v. Hartford Bridge Co.*, 10 How. 511 (U.S. 1850); *Mt. Pleasant v. Beckwith*, 100 U.S. 514 (1879); *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 12 Sup. Ct. 142 (1891); *Covington v. Kentucky*, 173 U.S. 231, 19 Sup. Ct. 383 (1898); *Trenton v. New Jersey*, 262 U.S. 182, 43 Sup. Ct. 534 (1923).

<sup>92</sup> 207 U.S. 161, 28 Sup. Ct. 40 (1907).

<sup>93</sup> 262 U.S. 182, 43 Sup. Ct. 534 (1923).

<sup>94</sup> *Goodnow, op. cit. supra* note 48, c. IX; *McBain, Rights of Municipal Corporations under the Contract Clause of the Federal Constitution* (1914) 3 NAT. MUN. REV. 284-303.

<sup>95</sup> *Codman v. Crocker*, 203 Mass. 146, 89 N.E. 177 (1909).

<sup>96</sup> *Kelly v. Pittsburgh*, 104 U.S. 78 (1881); *Kies v. Lowrey*, 199 U.S. 233, 26 Sup. Ct. 27 (1905); *Trenton v. New Jersey*, 262 U.S. 182 (1923).

Section 4 of Article IV of the Constitution, guaranteeing to each state a republican form of government, has no application to the organization of local government. *Eckerson v. Des Moines*, 137 Iowa 452, 115 N.W. 177 (1908); *Bonner v. Belsterling*, 137 S.W. 1154 (Tex. Civ. App. 1911); *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775 (1911). Questions arising under this section are of a political character and beyond the jurisdiction of the courts. *Pacific States Telephone Co. v. Oregon*, 223 U.S. 118, 32 Sup. Ct. 224 (1911).

<sup>97</sup> The modern English system of audit can be said to date from the Poor Law Amendment of 1834 and the Municipal Corporations Act of 1835. By the latter act the system of borough auditors was introduced, which has since been supplemented by the District Auditors Act of 1879. ROBSON, *THE LAW RELATING TO LOCAL GOVERNMENT AUDIT* (1930) c. I.

<sup>98</sup> The central administrative control over local legislation has also been gradually extended until today "all by-laws other than those affecting the prevention of nuisances

must be entrusted to the Home Office for sanction." WILKS, *THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS* (1933) 54.

<sup>99</sup> WALLACE, *STATE ADMINISTRATIVE SUPERVISION OVER CITIES IN THE UNITED STATES* (1928) 55 *et seq.*

<sup>100</sup> For a detailed consideration of the more drastic legislation, in Massachusetts, Indiana, Iowa, North Carolina, and New Jersey, see Stason, *State Administrative Supervision of Municipal Indebtedness* (1932) 30 MICH. L. R. 835-858. The situation in New Jersey is set forth in the Princeton Local Government Survey, entitled *The Budget Process in Local Government* (Nov. 1936).

<sup>101</sup> For a review of the appalling record, see HILLHOUSE, *op. cit. supra* note 51, cc. 2-7. Upson, *Local Government Finance in the Depression* (1935) 24 NAT. MUN. REV. 503.

<sup>102</sup> Board of Commissioners of Knox County v. Aspinwall, 62 U.S. 539 (1858); Galpee v. City of Dubuque, 68 U.S. 175 (1863); Town of Coloma v. Eaves, 92 U.S. 484 (1873).

<sup>103</sup> Rees v. City of Watertown, 86 U.S. 107 (1873); Thompson v. Allen County, 115 U.S. 550, 6 Sup. Ct. 140 (1885); Depew v. Venice Drainage District, 158 La. 1099, 105 So. 78 (1925).

<sup>104</sup> Meriwether v. Garrett, 102 U.S. 472 (1880); Fordham, *Methods of Enforcing Satisfaction of Obligations of Public Corporations* (1933) 33 COL. L. REV. 28.

<sup>105</sup> Upon this general subject see: *Administration of Local Credit*, comment (1934) 43 YALE L. J. 924; Tooke and Frye, *Recent Legislation for the Relief of Municipalities* (1935); HILLHOUSE, *op. cit. supra* note 51, c. 11; Dimock, *Legal Problems of Financially Embarrassed Municipalities* (1935) 22 VA. L. REV. 39.

<sup>106</sup> See notes 54, 55, *supra*.

<sup>107</sup> The exact allotments as of Nov. 11, 1936, involve 933 projects, entailing allotments of \$314,888,580. Of these allotments, the revenue bond loan figure is \$224,589,467. Of the \$224,589,467 loan allotments for the purchase of revenue bonds, PWA has already purchased a total of \$138,086,988. Outright grants by the federal government to municipal enterprises these past four years have approximated \$600,000,000.

<sup>108</sup> For a history of such legislation and the decisions of the courts, see the following articles by Edward H. Foley, general counsel of the Public Works Administration: *Legal Problems Affecting the Non-Federal Phases of The Public Works Program*, PROC. A. B. A., Section of Municipal Law (1935) 29; P. W. A. and Revenue Financing of Public Enterprises, *id.* at 51; *Some Recent Developments in the Law Relating to Municipal Financing of Public Works* (1935) 4 FORD. L. REV. 13. That a municipality by express statutory authority may bind itself to maintain rates sufficient to pay off a self-liquidating loan, see Department of Water & Power of Los Angeles v. Vrooman, 218 Cal. 206, 22 P. (2d) 698 (1933).

## A CENTURY OF INTERNATIONAL LAW

EDWIN BORCHARD

THE year 1836 marks an appropriate date from which to survey a century's development in international law. In that year appeared the first edition of the notable work of the distinguished American diplomat, Henry Wheaton, entitled *Elements of International Law*, which is still making periodic appearances in new editions in England and the United States.

In 1836 the Napoleonic wars had passed into history. The settlements reached in 1815 promised a political foundation for progress toward economic and social advancement. The former preceded the latter, but law was the essential handmaiden of both. The philosophical foundations of international law had been laid by the classic contributions of the thinkers of the seventeenth and eighteenth centuries, notably Gentili, Grotius, Bynkershoek, Wolff, and De Vattel. They wrote after the discovery of the new world or during and after the scramble for possessions, the growth of maritime trade, the assertion of claims of dominion over distant areas and over the sea, the break-up of the Empire, the Reformation, and the Thirty Years War. It was then that the modern State system may be said to have begun.

By 1836 the conflict between the naturalists and the positivists had gradually become reconciled, and the Grotians, standing midway, seeking to temper by morality, reason, and legal precept the hard practice of nations, had won the day. Realism was the keynote of political discussion. The United States had passed the stage of experiment and adolescence and had given evidence of both physical power and moral prestige. Its principles in behalf of freedom of the spirit, freedom of economic opportunity, and popular government had made their impress on a skeptical

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world. Out of them grew or expanded significant doctrines, such as nonintervention, recognition of *de facto* governments, freedom of the seas, neutrality—the latter two of venerable lineage. The organization of the Holy Alliance and the fear of its designs for the restoration of the Spanish American republics to monarchy had played an important part in initiating the Monroe Doctrine, a political principle of self-preservation and nonintervention diametrically opposed to the European doctrines of legitimacy and intervention on behalf of the balance of power or to ensure the supremacy of particular ideas or nations.

The peace of Vienna, concluded with a view to genuine European restoration and pacification, made important legal contributions by extending the doctrine of the neutralization of strategic territory, by stipulating the freedom of navigation in international rivers, by establishing the modern scheme of diplomatic representation, and by denouncing the slave trade. The Treaty of Ghent had worked out a definitive *modus vivendi* in North America.

The epoch-making arbitrations under Jay's Treaty of 1794 with Great Britain had proved both the practicability and the efficacy of arbitration as a mode of settling disputes in modern times, a system that was expanded to notable proportions in the nineteenth century. The French revolutionary and Napoleonic wars, while affording an occasion for serious violations of the then-known rules for the conduct of war at sea, had, nevertheless, given rise to a notable collection of prize decisions and to demands for reforms in the maritime law of war, reflected finally by public convention in the Declaration of Paris of 1856. The industrial revolution had begun. The accompanying demand for freedom from the restrictions on trade and for emancipation from the fetters of medieval thought received powerful stimulus from the United States.

The movement for the removal of shackles on international intercourse had led to the opening of international straits, in which Wheaton himself played a great part, and the further freedom of the navigation of international rivers. The freedom of the seas, for which Grotius himself had broken many a lance, had to some extent already been achieved, but the rights of neutrals rested under the moral weight of the belligerent impositions of the French revolutionary and Napoleonic wars. These restrictions were gradually thrown off by an enlightened development of municipal legislation and by the decisions of prize courts in favor of the rights of neutrals. The doctrine of "free ships free goods" and rigorous limitations on contraband had been accepted by large parts of the maritime world and enlisted in their support a growing literature.

At the end of the Crimean War, when Turkey, though still under the Capitulations, was admitted to the family of nations, the important Declaration of Paris (1856) was promulgated. It abolished privateering, recognized generally that enemy goods on neutral vessels and neutral goods on enemy vessels are free from capture unless contraband, and that blockades to be binding must be effective. Even Powers that did not sign the Declaration, like the United States, recognized its validity in practice.

The precepts of morality, nature, and reason, which the eighteenth century had advanced as limitations on power, were now fortified by practical considerations of expediency and helpful coöperation. Approved practice became a stronger source of authority than divine precepts or natural law, and practice was tempered by considerations of mutual forbearance and agreement in the competition for overseas territorial and political control. Conferences ameliorated the rigors of the struggle by negotiated reciprocal concessions, notably in the exploitation of Africa.

The democratic upheavals of 1848 weakened the principle of legitimacy and gave impetus to modern nationalism. Napoleon the Third developed it as a principle in France, from which it extended to Italy (1859) and to Germany (1871), both of which were consolidated after wars. The reorganization of diplomatic representation at the Congress of Vienna and the development of the consular service incidental to the growth of trade, together with the legalization of the doctrines of recognition of new states, had made it possible and necessary to improve the instruments and the rules of international intercourse.

The migrations to the New World, the rise of industrialism, international trade, and foreign investment gave new impetus to the economic and political relations between States and brought new subjects within the domain of international law. The wars of the nineteenth century, having for the most part been limited in scope, did not interrupt the steady advance in the wealth of nations and in the occupation and exploitation of backward areas by white peoples. The liberal outlook and laissez faire in internal economy was to a considerable extent reflected in international trade and international politics, while the dangers of imperialism and economic rivalry, although tempered by conference, were not fully perceived. The scope of international law was admittedly limited. The mistake of a premature overlegalization not conditioned by the facts of political intercourse was avoided, but insufficient attention was paid to the necessity for regulating the unfair competition that was leading toward collision.

The period following the American Civil War was marked by the growth of conventions for the amelioration of the cruelty of war. In 1863, Lieber's celebrated *Code of War for the Government of the Armies of the United States in the Field* was issued, and these have since become fundamental for land warfare. In 1864 came the Geneva convention for the amelioration of the



condition of the wounded, and, in 1868, the St. Petersburg convention forbidding the employment in war of explosive shells beyond a certain weight. The Brussels rules of 1874 concerning the usages of war, though unratified, exerted much influence.

The period of political consolidation in Europe was followed after 1874 by the period of dismemberment based on the so-called rights of nationalities, a movement which reached its apotheosis in the Treaties of Versailles, Saint-Germain, Trianon, and Neuilly (1919). After the Russo-Turkish War of 1877, the Balkan States were set up, and promptly became a source of conflict among the Great Powers. At the Berlin Congress of 1885 rules were laid down for the more regularized exploitation of Africa. Freedom of commerce, the neutralization of territory in the Congo district, the prohibition of the slave trade, the notification of occupations, and freedom of navigation of certain African rivers were stipulated. After the Sino-Japanese War (1894) and the gradual abolition of extraterritoriality in Japan, Japan was admitted as a Great Power.

The third quarter of the nineteenth century is marked by the establishment of many international administrative unions, such as the International Telegraph Union (1875), Universal Postal Union (1878), the Union for the Protection of Industrial Property (1883), Copyright Union (1886), and innumerable others connected with navigation, health, transportation, commerce, and labor.

The Hague Conferences of 1899 and 1907 constitute a landmark in international law in that they codified or revised many branches of international law. In 1899 the rules governing land and naval warfare were improved in the direction of limitations on belligerent excesses, restraints on weapons, such as asphyxiating gases, expanding bullets, projectiles launched from balloons, and other inhumane devices, and safeguards for the rights of

noncombatants and neutrals. Simultaneously, the processes for peaceful settlement of disputes were strengthened and improved. Mediation and conciliation and commissions of inquiry on disputed facts were projected and encouraged. The greatest contribution, however, was the adoption of rules of procedure for the arbitration of international disputes. Although the whole nineteenth century is marked by the extension of arbitration, it received special impetus in 1899 by the establishment of the Permanent Court of Arbitration, before which some eighteen important cases have come. The rules of procedure of the 1899 Convention for the Peaceful Adjustment of International Differences have laid permanent foundations.

The arbitrations of the nineteenth century, resulting in thousands of arbitral awards, had strengthened confidence in arbitration and encouraged both continuous resort to arbitration and a demand for the regularization of procedure. Possibly no greater stimulus for the promotion of the reign of law can be found than the awards of international tribunals dealing with nonpolitical disputes such as money claims for failure to extend adequate protection to aliens, and with political disputes such as boundary questions, of which over one hundred have been settled since 1836. This constant resort to legal processes in the settlement of disputes tended not only to substitute law for force, but encouraged the formulation of political questions in legal terms admitting of adjudication. The body of law which was thus built up gave new weight to the supremacy of international law over municipal law, enabled diplomacy to settle many emotional if not inflammable issues, such as the *Alabama* and *Venezuela-Guiana* cases, and encouraged the establishment of permanent or regular tribunals for the adjudication of international disputes. The most notable manifestation of the success of this endeavor is the establishment in 1920 of the Permanent Court of Interna-

tional Justice, which has handed down some sixty-three judgments and advisory opinions.

The Hague Conference of 1907 improved on the rules of arbitration and adopted certain additional conventions dealing with the opening of hostilities, the position of enemy merchant ships in port on the outbreak of war, the conversion of merchant vessels into warships, the rights and duties of neutral States in land and naval warfare, the laying of automatic contact mines, the bombardment of undefended places by naval forces, the treatment of fishing vessels, postal correspondence and other restrictions on the right of capture, and the prohibition of the use of force in the collection of contract debts. A convention for the creation of an international prize court left to another conference the establishment of uniform rules of prize law. The result was the Declaration of London (1909), not ratified but adopted, nevertheless, by several Powers. It reaffirmed or modified existing rules of law on blockade, contraband, continuous voyage, un-neutral service, destruction of neutral prizes, transfer from enemy to neutral flag, enemy character, convoy, resistance to visit and search, and compensation for breaches. The international prize court was never established because of inability to agree upon a method of selecting judges.

On the American continent, the important Pan-American Congresses of 1889, 1901, 1906, 1910, 1923, 1928, and 1933 and the International Commission of Jurists at Rio de Janeiro appointed for the codification of law considered or adopted lawmaking conventions on aliens, claims, arbitration, the recognition of new governments, boundaries, jurisdiction, corporations, immigration, diplomatic protection, extradition, freedom of transit, navigation and aviation, treaties, diplomatic agents, consuls, maritime neutrality, the refusal to recognize the results of conquest, and other subjects. Some of these conventions have been ratified by

most of the States, and some by only a few, if any. But they marked a lawmaking trend and are not without importance as evidence of the growth of law. The Inter-American High Commission fostered the adoption of numerous treaties facilitating trade and commerce. In 1907 a Central American Court of Justice was established, which lasted about ten years. Conciliation commissions have been established among the American countries and it is not unlikely that an inter-American Court may be reestablished.

With the growth of population, science, industry, intercourse, foreign trade and investment, the relations between States in the nineteenth century became ever more complex and more in need of legal regulation. Treaty and statute developed rules concerning the rights of aliens, citizenship, naturalization, extradition, claims, and practically every aspect of coöperative protection for property, tangible and intangible. Commercial treaties became more detailed, and international conventions on an ever-widening scale and frequency embraced subjects, such as patents, trademarks, and copyright, unknown to earlier centuries. Migration of populations on a large scale evoked naturalization treaties and treaties for resolving conflicts of nationality. Navigation and commerce were improved by reciprocal grants of privileges and concessions, and the shackles of local preference and favoritism were relaxed by a steady lifting of restrictions. New subjects unknown to Wheaton in 1836 rapidly expanded in importance, such as extradition, the prerogatives and limits of jurisdiction, judicial assistance, the effect to be given to the acts of *de facto* governments, and the diplomatic protection of citizens abroad. As already observed, the century is notable for the development of arbitration as an institution, and it may be hoped that that gain will not be lost. The many claims commissions of the nineteenth century, themselves the result of a growing intercourse and for-

eign investment, enlisted confidence in the process of arbitration as a means of resolving disputes. Probably the institution of arbitration has made progress because from the first it was recognized that, if abused by making too many demands upon it, its utility would be weakened. It has, therefore, always been confined to the settlement of questions formulated in legal terms, and the efforts of the twentieth century have been confined to the removal of reservations even from this limited commitment. The institution needs for its growth a confidence in judges and among nations that can only be evoked by successful experience and friendly political relations.

Political theory in its relation to international law made important progress during the century under consideration. The theory of sovereignty has impinged on international law in two respects: (1) in the assumption that as law is the will of the State, no rules of international relations have the force of law except by the consent of the State; (2) that as the State epitomizes moral values (Hegel), international law has only such validity as the State concedes. To explain the obvious fact that particular States have often been held bound without their consent and that the moral value of a rule has not been left to any individual State to determine, the argument of auto-limitation (Jellinek) was developed, by which the subjection of the State is explained as voluntary. But a State which is bound only to the extent that it wishes to be bound is not bound at all. Perhaps Austin, who considered as law only that which was laid down by a political superior to political inferiors, believed that; but the experience of a century with international tribunals conclusively negatives any such assumption. Law must be objective, and once it is recognized as a rule by international tribunals or majority practice, a State can neither refuse obedience nor be the judge of its moral value. A new State entering the community of States is bound

immediately by all the rules of the organization. Its consent to any or all the rules is not asked. The assumption of the system is the equality of all States before the law; none can ask exemptions or favors.

Only new international law, derived from international legislation, rests on express consent or agreement, and even then probably only for a comparatively restricted period would the unwilling State be able to deny the force of a rule generally accepted. But in the matter of customary international law, which embodies the bulk of the rules, neither complete consent nor agreement of States is necessary. Even Bodin, while an absolutist in the internal aspect of sovereignty, viewed external sovereignty as subject to the law of nations. Unfortunately, many of his successors reversed the process, for they appear to regard sovereignty, viewed as a symbol of the State in international relations, as absolutely free from external restraint. But, when the President or Secretary of State on the demand of foreign nations, invoking a rule of international law, releases an alien from military service or releases a rum-runner seized outside the three-mile limit, and thereby in effect overrides a statute of Congress and a supporting decision of a municipal court, he is acting as a societal agent of the American people and State and is recognizing the binding character of international law in the United States and everywhere else. When foreign nations refused to permit Russia in the Russo-Japanese War to make foodstuffs contraband or in other respects to violate the rights of neutrals, when foreign nations deny to the countries of Latin America the privilege of unilaterally defining the term "denial of justice" or, by contract with their citizens, of exacting a waiver of the privilege of demanding diplomatic protection, they are invoking international law as a rule of law superior to any contrary rule of municipal law.

These cases, cited only by way of illustration, evidence the fact

that no State can posit its freedom from the rules of international law. No State so professes. The mere fact that violations of international law occur and occasionally go unredressed is no evidence that the rules violated are not law, any more than the no less frequent violation of municipal law is evidence of its nonlegal character. International law is often uncertain; so is municipal law. The sanctions are somewhat different, but they are probably none the less effective and the interpreting agencies none the less active. International courts do not "enforce" international law; no more do municipal courts "enforce" municipal law. But the declaratory and binding decisions of international courts are observed and carried out with a uniformity equal to that of municipal courts. The agencies for the enforcement of international law are not necessarily courts but other constitutional organs, usually the executive. The weakness of the system, which attracts a disproportionate amount of attention, consists in the inability to compel nations to submit their differences to a court and in the physical power of States, exercised on occasion without regard to law, to constitute themselves plaintiff, judge, and sheriff in their own cause.

It is in the institution of war that we find least encouragement for the philosophy of progress. In many of the books of the seventeenth and eighteenth centuries the practices and rules of war were among the principal concerns of writers on the law of nations. Even in Wheaton's work, the law of war takes up approximately half the volume. And if the description of peaceful methods of settlement, like conciliation and arbitration, have happily in modern treatises usurped some of the space usually devoted to war law, it cannot be said that war and its legal consequences and effects have diminished in importance. The rules of the system developed during the nineteenth century in the direction of enlarging the rights of neutrals, limiting the rights of

belligerents, and promoting humanitarian practices. These were regarded as advances, although from some of the ostensible peace literature of today, with its devotion to "enforcing" peace by "collective" action against "aggressors," a different impression might be obtained. From the Treaty of Paris of 1856 down to the Declaration of London of 1909, the conduct of war both in practice and convention became more regularized and persons and property received greater legal security from its ravages. There was even a movement for the abolition of contraband, supported by Great Britain at the Second Hague Conference of 1907, and for the acceptance of the reiterated American thesis of the immunity of private property at sea. Private enemy property on land after 1815—even in enemy territory after 1863—had received complete immunity from confiscation, in practice, treaty, and multilateral convention. Its safety was regarded as assured.

But so volatile a creature as man cannot be relied on to preserve even his elementary virtues, and under the strain of the European war of 1914, which the United States enlarged beyond control, many of the hard-won victories of law over force and of self-restraint over recklessness went—we may hope only temporarily—by the board. Not least among the delusions that accompany the settlement of 1919 is the assumption that the world has through the League of Nations, which constitutes Part One of the Treaty of Versailles, marked its final emergence from barbarism and the reign of force. On the contrary, the callous confirmation as unchallengeable of all the violations of law committed by the winning nations and the revolutionary practices embodied in the peace treaties have given law a setback which we can only hope is not irretrievable and have postponed indefinitely the hope of long-continued peace. The violations of the rights of neutrals during the war by illegal "blockades," the planting of mine fields on the high seas, the declaration of "war zones," the extension of



the doctrine of continuous voyage so as to prevent neutral from trading with neutral, the rationing of neutral countries, the "black lists," the retaliatory suppression of the category of goods "conditionally contraband," the unprecedented enlargement of contraband lists, the flying of neutral flags on belligerent ships, the taking of passengers of alleged enemy nationality from neutral ships, the capture and sinking of enemy ships in neutral waters, recruiting on neutral territory, the purchase of munition plants in neutral territory, confiscation of private property on land, capture of enemy ships in port on the outbreak of war, sabotage in neutral territory, the violation by neutrals of neutral obligations, the refusal in influential quarters to admit the illegality of these measures, and, above all, the failure to make a peace of reconciliation and appeasement foredoomed to failure any chance of disarmament or of improvement in political relations. Mere belligerent violations, which necessarily receive more attention than observance of law, would have had no such effect. It is the avoidance of all effort, even by claims commissions, to vindicate the rule of law that stimulates reliance on force, weakens confidence in peaceful intentions or possibilities, impresses on the lay world the erroneous belief that the law has been not only broken but abrogated, and gives rise to the hasty assumption that peace can be preserved by untried and quack methods operating with mechanical precision.

The League of Nations plays a curious role in this evolution. Like many institutions that enlist wide support, it embodies both good and doubtful intentions, practical and impractical provisions. It is still uncertain which will prevail. The assumption that you could make an adventitious distribution of power hardly corresponding to the requirements either of economic equilibrium or physical strength and then hold it down in the name of law and morality was certain to lead to disappointment, if not

disaster. Articles Ten and Sixteen of the Covenant were regarded as the guarantors of the system thus set up. The more beneficent purposes of international organization and the many useful administrative functions of the League were overshadowed by its war-making machinery on behalf of the *status quo*. This was to be the new panacea for preventing disturbances of the peace.

It was argued that any disturbance of the peace had become so serious a problem that every nation had an interest in suppressing an outbreak, now characterized as an attack on all the members of the family of nations. The organization set up was designed to prevent such disturbance, but if any nation resorted to "war" to solve its difficulties the others would convene to denounce it as an "aggressor" and take joint action to bring it to heel. Thus, "aggressors" were either to be frightened into remaining contented or at least restrained, or else, if they broke loose and started shooting, all the other nations would, in disgust or anger at such a breach of etiquette or covenant, sever all trade relations with the "aggressor," enjoining abstention on their respective nationals, and even preventing "financial, commercial, and personal intercourse" of the Covenant breaker with the nationals of a State not a member of the League. Armed blockade and more severe sanctions might follow. In addition, the territorial integrity of all the members of the League was to be jointly guaranteed.

The system thus established is explained in part by the postulate of a holy crusade, on which, in certain countries, the war was fought. Speaking of a similar scheme to "enforce peace" proposed by the French government, an astute Frenchman, Charles Dupuis, remarked that it was "precise, complete, logical, chimerical, and impractical." Every attempt to apply the contrivance in China, in the Chaco, in Ethiopia has resulted in widening the rift between the Powers and in further disorganizing international

relations, if not the League itself. And this is natural, because the scheme has no roots in human experience. It was sustained in certain optimistic circles by false analogies drawn from the municipal control of the State over its citizens, by the theory of the policeman keeping order, by the argument that a federation of nations was a logical development from the "anarchy" which had supposedly brought on the war, and by other assumptions totally or partly lacking in validity or application. It was overlooked that the traditional European feuds and ambitions had not been exorcised, that the *status quo* was neither economically nor politically manageable, that the system was distilling psychological poisons among the peoples of Europe, that no coalition had ever lasted long, and that the divergent interests of the European Powers were certain to lead to its disintegration. The term "collective security" was devised to describe this strange invention. But its greatest misfortune lies in the fact that it blinded public opinion in many countries to the realities of international life, that it covered in a cloak of romantic uplift a steady deterioration in the relations among the peoples of Europe, that it made negotiation, reconciliation, and appeasement, always heretofore deemed indispensable conditions of peace, seem no longer necessary. Thus, genuine peacemaking was indefinitely postponed, as became evident from the astronomic increase in armaments, hardly interrupted by the war conference commonly known as the disarmament conference of 1932.

But the false assumption that the way to peace had been found in the new contrivance had other unfortunate results. It produced a highly financed propaganda designed to disparage the only international law that had ever achieved recognition and to undermine the independence of the United States and respect for its own traditions of nonentanglement in European politics. The belief that the new arrangement for "enforcing peace" consti-

tuted the new "international law" led to a world-wide and especially American campaign to discredit neutrality as a thing of the past, and to discountenance the very philosophy of neutrality as immoral, impractical, and iniquitous. The ideology of taking sides in every war, on the alleged justification of preventing or stopping it, has made such strides as to make it difficult to explain to the public what is meant by genuine and honest neutrality and its practical function on behalf of peace and sanity. The moral conviction that wars can be shortened by placing embargoes on aggressors, openly or under guise of ostensible impartiality, refuses to yield to the historical and legal argument, on the alleged ground that conditions are now quite different from any heretofore known. The fact that the United States became engaged in the last war is erroneously advanced as evidence of the inevitability of that entanglement and of like participation in the next war. This view has led to subjective revelations that trade got us into the last war and that hence the way to keep out is to have no trade or as little as possible; that the way to peace is to abandon neutral rights, on the utterly false assumption that it was insistence on neutral rights that doomed us in 1917; that international law was "shot to pieces" in the late war and that hence the new law is to be found in its recent violations; that everything is now contraband; and that neutral "rights" depend on belligerent grace and favor. These are only a few of the fantastic notions that accompany this period of demoralization. The struggle for the return of reason and law as the foundation of useful international intercourse is thus greatly handicapped. Heretofore it had always been thought that neutrality was one of the beneficent products of history, enabling some people to preserve their peace when others lost their heads and permitting the thread of civilization to be kept alive. Now neutrality is attacked by professed pacifists, a necessary incident of the tragic paradox that

the most vocal moral support for war emanates today from the zealous souls who would "enforce peace" by coercive, hostile, and violent measures.

But whatever the fate of neutrality in the distant future, it is indispensable in a world of independent States without a common superior possessing the privilege of determining the size of their military equipment and their tariff barriers and other instruments of unfair competition. Indeed, when it is recalled that the political competition for national aggrandizement, the acquisition and control of territory, advanced or backward, and of spheres of influence, the struggle for markets and raw materials, the quest for and grant of trade preferences, the height of tariffs and immigration policies, and the size of armies and navies—fundamental factors that determine the economic and political relations of States—have escaped the control of international law, it will be realized that the conflict of interests is ever present and the necessity for change sometimes irresistible; and that the feeble control of law over these processes and phenomena stimulates the potency of political factors. Under such circumstances, escape from the storm of conflict is a far greater service to the nation and to humanity at large than the expansion of the conflagration and the incidental promotion of general disorder, not to speak of possible national extinction for small States. The campaign against neutrality, therefore, is founded on certain preconceptions of a world that does not yet exist, and which in the light of the prevailing factors can hardly be brought into existence at an early date. The healthy growth of the international system will lie in a rational deflation of the causes of conflict, in a *detente* of political and economic rivalry and hostility, in the gradual extension of the jurisdiction of law over the now uncontrolled manifestations of force and arbitrary sovereignty, and in the development, perhaps, of an international

legislature or conference which shall have power to negotiate or direct desirable changes in the *status quo* and thus make the resort to force unnecessary and hence illegal. Until that day the doctrine of *pacta servanda sunt* has only a relative validity, and if insisted upon too strongly, is likely to provoke violence. From the day of directed changes we are far removed, and since 1919 precious time has been wasted in a futile effort to freeze an unhealthy *status quo* in the name of peace and the higher morality.

The new ideology also disparages belief in the practicability of rules of law during war, with the result that since 1919 international bodies have rarely considered them. But in spite of the repugnance to consideration or reconsideration of the laws of war, the nations have not been entirely oblivious to them. Delegates of the principal powers assembled at The Hague in 1922 to draft a code of law on the use of aircraft and radio in time of war, and numerous recent bilateral and multilateral treaties, including those concluded at Havana in 1928, reflect the realization that war may break out and that, if it does, it must be regulated so as to prevent reckless destruction and to preserve the possibility of restoring a sane peace and resuming civilized life. That has always been one of the main purposes of the laws of war, so that those who manifest congenital indisposition to consider them and who believe either that it is impossible to control the conduct of belligerents or that it is best not to seek to do so are contributing to the intensification of the horrors of war and to the impossibility of resuming civilized life after the war is over. Possibly they were too greatly impressed by the belief that all wars are world wars, or that all countries are likely to be involved, or that belligerents will always violate the law. There is very little justification for such belief. Heretofore it has been regarded as a service to limit by rule the devastating effects of the scourge of war by restraining the belligerents and holding them to that

established compromise between neutral and belligerent claims which constitutes the laws of war. Centuries of tradition, the possibility of reprisal, the arousing of hostile public opinion, and their own claims when neutral have served to restrain belligerents; but if it is suggested that there are no rules of war, that expediency alone determines the limits of recklessness, then even these safeguards for restraint and the resumption of peaceful ways are decisively weakened. In no earlier period of which I am aware has there been a suggestion that, by weakening the law, order or civilization was promoted. The fact that such ideas now prevail is symbolic of the disorganization of modern society and arouses apprehensions regarding its capacity to preserve itself.

But, in the law of peace, codification has been attempted, not only in numerous multilateral legislative treaties but in subjects of the customary law. In 1930 an international Conference for the Codification of International Law was called at The Hague under the auspices of the League of Nations to resolve conflicts of nationality laws and to agree on the rules governing territorial waters and the international responsibility of States arising out of injuries to aliens. The Conference drafted a convention dealing with some of the nationality problems, but had to record its inability to agree on the other two subjects. The Conference demonstrated the difficulty of codifying any subject on which there is a considerable minority opinion, and for the present the attempt is not likely to be renewed, at least in a general world conference.

Perhaps the less said about the Kellogg-Briand Pact the better. It evidences the earnestness of the quest for peace, while disclosing its precariousness. The qualifications and reservations attached to the commitment embraced in the Pact deprive the renunciation of war of any value, and its innocuousness as a peace agency may be inferred from the practical unanimity with which it was signed. The attempt to "interpret" it into functional

application by the so-called Budapest Rules of the International Law Association can only excite wonder. But its political purpose is not doubtful, for it has enabled European nations to persuade American secretaries of state to harass and threaten certain disturbers of the peace distasteful to influential Powers, and in that sense has served them nearly as well as American membership in the League. The Pact is thus a temptation to the United States to "enforce peace."

The ideology of "enforcing" a collective or superior will upon a State has given rise to numerous developments in international law designed to encourage intervention, movements which are antithetical to ordered evolution in international relations. The ostensible condonation during the war of the doctrine of retaliation, and especially on neutrals, has led to the supposition in some quarters that belligerents now have permanent control of the seas and that neutrals navigate and live on sufferance. Nothing could be more subversive. The doctrine that "intention" of the neutral shipper can be investigated by a prize court dealing with a shipment from neutral to neutral destroys the foundations of prize jurisdiction. In this respect the British Order in Council of March 11, 1915, undermined the Declaration of Paris and flouted international law. Neutrals should then have organized, as in 1780 and in 1800, to defend their elementary rights. Belligerent diplomacy outmaneuvered the neutrals, and neutrals and peace may have to pay a heavy price, immediately evidenced in a universal expansion of naval armaments. The submission to fantastically exaggerated lists of contraband which the belligerents would, as neutrals, never tolerate has also seemingly exposed neutrals to further unjust and illegal oppression. Treaties, as in the seventeenth and eighteenth centuries, may again have to define contraband as limited strictly to military weapons and equipment. While the abolition of contraband would be a



boon to humanity, the purported abolition of the distinction between goods absolutely and goods conditionally contraband—even though justified as retaliatory only—would drive us back to barbarism by enlarging the area of war and exposing neutrals to extinction. Reprisals on neutrals, except for neutral delinquencies, cannot be accepted as legal—nor can the belligerent appropriation of “war zones” from which neutrals may be excluded. The detention of neutral vessels to determine ultimate use of the cargo could ruin all neutral commerce and should evoke determined protest. Mine barrages on the high seas are equally illegal. The idea that war is totalitarian and that all the inhabitants of an enemy country are combatants was as invalid in 1916 as it was in 1793, but in 1793 the relatively weak United States had the capacity to resist successfully the illegal imposition.

The doctrine, suggested at the time of the bombardment of Corfu and now advanced by the Institute of International Law, that “armed reprisals” are permissible without constituting war seems hardly tolerable. It is only consistent with the new theology that you can fight for peace, subjugate with peaceful intentions, and exterminate a people in the name of law and order. This doctrine is an encouragement to the use of violence, not less dangerous to the peace of nations because it purports to have limited effects. It would raise to the domain of recognized law among advanced nations the unauthorized practice of coercing by violence backward or uncivilized peoples. If resisted, as it would be by any nation capable of resistance, it can lead only to a state of war. To immunize acts of war in the cloak of legality, provided the hostile purpose is limited, can add only to general confusion when clarity is essential.

These attacks on the doctrine of national sovereignty, still the foundation of international law, by legalizing intervention under the guise of collective or punitive action, can only weaken the law. International law especially is a matter of slow growth,

and revolutionary short cuts are likely to prove not only abortive but destructive. This is a mark of the times in which we live, manifested by governments and by academic bodies. It is not a healthy sign, for it promotes the reign of impulse and emotion rather than deliberation and law. The January 1936 proposal to revolutionize the obligations of neutrality in the United States is an indication of the temptations to which the modern administrator is exposed.

Comparisons between 1836 and 1936 are not altogether inspiring. While material progress may be observed on every hand, we may also notice that man has not registered serious improvement in the art of government and that the implements of science facilitate the possibility of fratricidal and devastating strife. In 1836 there was more confidence in an ordered future than there is today. The economic system was not then under challenge, as it has been since the maturity of the system of industrial production. Now both economic and political systems are in ferment, and there is a loss of confidence in man's capacity to govern others any better than himself. How far the international disorders are a reflection of these internal maladjustments it is hard to say, but the two doubtless exert reciprocal repercussions.

The realization of a superstate, or of a surrender to an international body of the control of tariffs, national policies, armaments—which would alter the position of nations to resemble the position of a state in the American Union—is probably remote. Until that time comes, we must be prepared to deal with international law as it is, and yet labor to bring within its range those relations which now escape its control, to close many gaps, to deflate the causes of political competition and war, and to persuade the nations to realize that coöperation, even at the sacrifice of national self-sufficiency, is a wiser and less costly exercise of independence than a recalcitrant insistence upon one's own ambitions, regardless of the common welfare.

# THE AMERICAN SCIENCE OF INTERNATIONAL LAW

JOSEF L. KUNZ

## I

THERE can be no doubt that the study of international law, as regards both teaching and research, has made enormous progress in the United States during the last hundred years, particularly since the beginning of this century and more so since the end of the World War. To convince us of this fact, it is only necessary to compare the complaints made thirty years ago<sup>1</sup> about the few universities teaching international law with the situation today.

Today, international law is taught at the law schools of most universities, in colleges,<sup>2</sup> in departments of political science. Many universities have excellent libraries on international law; ample opportunities for publication exist—special scientific journals are devoted to international law and many “law reviews” contain articles on international law; the number of doctors’ theses in this field is increasing. Many scientific societies occupy themselves with this branch of jurisprudence. Special institutions devoted to international law exist at or in connection with universities. The School of Foreign Service was created in 1919 at Georgetown University, Washington, D. C. The Bureau of International Research, Harvard University and Radcliffe College (director, George Grafton Wilson), and the Research in International Law, Harvard Law School (director, Manley O. Hudson), are entirely devoted to research in our field. The Carnegie Endowment for International Peace has a highly important Division of International Law (director, James Brown Scott).

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The annual publications of the United States Naval War College (since 1900) are of great importance. Many institutions, such as the Council on Foreign Relations, the Foreign Policy Association, the World Peace Foundation, tend by their publications to increase the interest in and the understanding of international problems among the general public.<sup>3</sup>

Great progress has further been made in the science of international law.<sup>4</sup> America is today among the leading nations in the important science of international law, as regards the number and quality of scientific publications in this field and as regards the number of scholars of international importance.

This extraordinary progress can be traced back to the change in the international importance of the United States and to the birth of a scientific study of the law.

To the original small, weak, and faraway United States the policy of isolation and the warning against foreign entanglements was perfectly adequate and Americans had enough to do to take the continent in possession and to civilize it. The United States of today, as one of the most powerful States of the world, is necessarily involved in all international problems. This change was bound to enlarge the interest in and the study of international problems. But the ideology of the Independence era is still powerful in the thinking and the political life of the country. The words of the "Fathers" have become not only a tradition, but to some extent sacred, regardless of the change of circumstances in the last one hundred and fifty years. The discrepancy between the sacred tradition and the actual facts not only explains the fluctuations of American foreign policy between isolation and coöperation or even American leadership, but forms also the political background from which to understand the American science of international law. It furnishes to our science many of the problems with which it has to deal, whether it analyzes the

law or is engaged in making proposals *de lege ferenda*. Furthermore, the sacred tradition exercises its influence on the American representatives of our science, whether they are internationalists or isolationists; they have, at least, to take this tradition into consideration as a political and psychological fact.

The other determining factor is the development of a *science* of the law, brought about by the victory of the law schools. Today it can no longer be argued that international law is not necessary from a practical point of view. The many international conferences in which the United States participates, the growing coöperation with the League of Nations, the Pan-American and Pacific relations, the beginning of a career in diplomatic and consular service, the many international tribunals, as well as mixed claims commissions to which this country is a party, and the growing importance of the questions of international law before the courts make the study of international law every day more urgent. International law has, therefore, a very real place in law schools. But just as there is a discrepancy between the present international situation of the United States and traditional thinking, so has the system of the law schools not yet fully borne fruit: the scientific character, inherent in the law schools, is still subordinated to their professional character. And it is, therefore, still sometimes argued that international law is not necessary for the "practising lawyer." The consequence of the professional character of American law schools is that even where international law is taught—and this is today the case at most of the great law schools—its study is only optional, not obligatory; that, in consequence, the number of students studying it is, in relation to the total number of students at the law schools, everywhere very small; that, in a word, international law—like history of law, philosophy of law, Roman law—is still regarded as a "borderland subject"; that it is still at the periphery, compared with what is known as the "technical law."

## II

The American science of international law has today a very pronounced character of its own, which distinguishes it clearly from the French, Italian, German, or other sciences of international law. This distinguishing character is shown by every publication, by every number of the *American Journal of International Law*. The one-hundredth anniversary of the founding of New York University School of Law is perhaps an adequate occasion to inquire into the peculiar character of the American science of international law, into its particular virtues and eventual shortcomings, to inquire by what features it is distinguished from and how it fits into our international science of international law. Teaching and research will have to be taken into account, for the methods of teaching and research are deeply interconnected, reflecting upon one another.

To clarify the problem, it is first of all necessary to delimit the problem of our inquiry. We have to deal here only with the science of international law. This science, to take the American curriculum into consideration, must, therefore, be clearly distinguished from "international relations" and from "international organization" or "international government" as it is sometimes called.

That international relations certainly is a very different thing from international law, although the American literature on international relations is to a great extent written by international lawyers, is universally recognized. But the delimitation between international organization—the American literature on this subject is again written mostly by international lawyers—and international law is by no means so secure. According to the preface of Clyde Eagleton's excellent book,<sup>\*</sup> "international government" stands, so to speak, halfway between "the wide field of international relations" and "going too far toward technical law"; it is

limited to the "governmental aspects of international life." In a word, it is essentially international law, but treated in a nontechnical, *i.e.*, nonjuridical, way; it stands in the same relation to international law as "American government" does to Constitutional law. But if we are told that such things as international arbitration, its organization and procedure, "do not, properly speaking, belong to the science of International Law"<sup>6</sup> or that the League of Nations "is not strictly International Law," strong protest must be voiced against these statements; it must be emphasized that these subjects do belong most strictly to international law. The difference between international organization and international law is not so much a difference of *subject*, as a difference in the *method of approach*.

But even after this first clarification and delimitation the American science of international law presents a complex problem. For, in America, international law is taught at the law schools and in the departments of political science, and the teaching methods—in consequence, also the research methods—are very different. It must be fully understood that this situation is absolutely unique. All over Europe, including Great Britain, international law is taught exclusively at law schools, and is considered, without exception, to be a part of jurisprudence; teaching and research are, therefore, done on juridical lines. The fact that in the United States international law is also taught not only to non-lawyers but also by non-lawyers, that the representatives of the American science of international law are not, as in all other countries, a homogeneous group of jurists but are composed of lawyers as well as non-lawyers is a fundamental difference that goes far to explain the particular character of the American science of international law.

And in so far as the teaching and research are done at law schools and by jurists, two factors must be borne in mind in order

to explain the difference between the science of international law in America and in "civil-law" countries; namely, first, that the American law schools are professional schools, where, therefore, the professional point of view of teaching international law merely as "technical law" predominates, and, second, that the jurists among the American representatives of our science are, of course, common-law lawyers.

The factors mentioned are, in this writer's opinion, the basis from which we can understand the character of the American science of international law, as regards both its contents and its methods.

As regards the nature of the *problems* with which the American science of international law deals, it is, of course, not intended here to go into details and to give bibliographical data.<sup>8</sup> Suffice it to say that the American science of international law continues to produce general treatises on international law as a whole. Particular emphasis must be laid on John Bassett Moore's monumental *Digest of International Law*, which has become a standard work and a model for similar enterprises in Europe, and on Charles Cheney Hyde's fundamental treatise,<sup>9</sup> the most important manual of international law ever written in North America. The American science of international law is also rich in monographs dealing either with the problems of international law in a particular region (*e.g.*, the Far East), or with particular institutions.<sup>10</sup> Small is the number of works treating problems of international law from a historical point of view. Purely theoretical monographs or treatises are characteristically absent.

Similar to the British, but very different from the Continental, the American science of international law has devoted, also since 1920, many studies to the laws of war. We name here, as examples, J. Wilford Garner's *International Law and the World War*,<sup>11</sup> which is still the best work written on this topic in any



language; the masterful study of John Bassett Moore: *International Law and Some Current Illusions*;<sup>12</sup> the important study by M. W. Royse on *Aerial Bombardment and the International Regulation of Warfare*.<sup>13</sup>

No other topic is so much at the very center of the American science of international law as the problem of neutrality. The predominance of this problem in the political life of this country, the controversy over neutrality—a consequence of the political background, of the struggle between the tradition and the actual situation—fully explains why the American science is so much occupied with this problem, which is held to be vital and which at the same time is so highly controversial. It is, of course, impossible fully to illustrate here the extent to which this problem occupies our science. A few indications must suffice. This problem was the only topic of the 1935 annual meeting of the American Society of International Law. It is actually on the agenda of the next series of studies by the Harvard Research in International Law. Works of a historical character, how America went into the World War,<sup>14</sup> on the attitude of America toward neutrality in former times<sup>15</sup> are increasing. The Columbia University Council has, under the chairmanship of Philip C. Jessup, published a most important scientific work on *Neutrality, Its History, Economics and Law*.<sup>16</sup>

With regard to neutrality, two opposite schools—nearly the only case where we can speak of “schools” within the American science of international law—can be clearly distinguished: the proneutral and the antineutral schools. The representatives of the first school—John Bassett Moore, the leader, Edwin M. Borchard, Charles C. Hyde, Philip C. Jessup, Francis Deak, to quote a few names—see in the representatives of the second school—Henry L. Stimson, the leader, Quincy Wright, John B. Whitton, Charles G. Fenwick—“utopians” and “evangelists,” whereas the repre-

sentatives of the second school label those of the first as "reactionaries." The difference between the two schools lies not only in legal differences but in a different philosophy, a different conception of life, a struggle between isolation and coöperation, a difference in political postulates *de lege ferenda*. The difference in the two schools is clearly seen in their attitude not only toward neutrality, but also toward the laws of war, the Pact of Paris,<sup>17</sup> and the League of Nations, the greatest and indefatigable protagonist of which in this country certainly is Manley O. Hudson.

But the two schools are by no means homogeneous within themselves. Among the "internationalists" at least two trends can be observed. Some, approaching the subject along truly international lines, stand for American membership in the League of Nations, for the *abolition*, the *end* of neutrality. The others, taking into account the isolationist feeling of the public, its insistence on sovereignty, its dislike for the enforcement of international obligations by military means, concentrate their endeavors on the Pact of Paris. They do not stand for the abolition, but only for the *modification* of neutrality: strict "neutrality" in military, "partiality" in economic matters.

Equally split among themselves are the proneutrals. Some stick to the traditional neutrality; the others—under the leadership of Charles Warren—advocate a new "isolationist" neutrality, emphasizing the duties, not the rights, of neutrals. A third group would like to "keep this country out of war" but to make at the same time a contribution toward not helping to prolong foreign wars.

The struggle for neutrality is not only a consequence of the political background of this country, but also a symptom of this world-wide period of transition in which we are living. It is, therefore, clear that the struggle of the two schools, deeply inquiring into all the problems of neutrality from opposite points

of view, is extremely valuable, from a purely scientific as well as from a practical point of view.

Studying the literature on neutrality by both schools, we will see that sometimes studies that are clearly political postulates *de lege ferenda* are presented under the false guise of telling us what the positive law is, a symptom of a highly dangerous confusion of methods.

This last remark brings us to the second fundamental point with which to test the characteristic features of the American science of international law: the problem of *method*. We have said already that the jurists among the American representatives are, of course, common-law lawyers, and common-law thinking exercises its influence upon the non-lawyers also. This fact necessarily gives the American science of international law a different character as compared with Continental or Latin-American international law, for the difference between common law and civil law is much more than a difference of contents of norms; it is a difference in legal training, in legal thinking. "Common Law learning is forensic, civilian learning is scholastic," to quote Sir Frederick Pollock.

The American jurist quite naturally approaches international law from the angle and the methods to which he is accustomed through common law. First consequence: the problem which is so much discussed elsewhere—namely, whether international law is law at all or whether it is law "in the true sense"—does not exist. Law, for the common-law lawyer, is simply rules enforced by the courts.<sup>28</sup> It is true that sometimes, under the weight of Austin's theories, even in America the legal character of international law has been denied.<sup>29</sup> But this is an exception. Generally speaking, "no opinion is expressed on the vexed question whether it is law in the abstract,"<sup>30</sup> and it is held "that a vast deal of time has been wasted in controversy over the question whether Inter-

national Law is law at all."<sup>22</sup> The fact that courts take judicial cognizance of the existence of international law and enforce it is sufficient proof of its legal character. To this must be added the inherited British conception that "International Law is a part of the law of the land."<sup>23</sup>

This is in this writer's opinion an advantage. And the common-law lawyer has another advantage: international law is, in its structure, nothing unusual to him. To the civil-law lawyer the customary character of general international law is not only a symptom of its primitiveness, but confronts him also with the particular problems of an unwritten law—uncertainty of its existence, difficulty of ascertaining the contents of norms—problems to which he, trained in legal systems that are codified on the basis of the Roman law, is not accustomed. But, as common law is by definition customary and unwritten law,<sup>24</sup> the structure and technique of international law are to the American international lawyer familiar phenomena.

Common law derives its authority from judgments and decrees of the courts, recognizing, affirming, and enforcing legal unwritten rules. Common law is "case law." The common-law lawyer, whose whole juridical interest is concentrated on the one legal figure of the decisions of the courts, quite naturally thinks in terms of "cases" also in dealing with international law. The "case," therefore, predominates the American science of international law, just as it does the British, in contrast to the Continental and Latin American science, where the cases, up to a short time ago, were almost entirely neglected. Now a scientific work on international law without cases is in the eyes of American international lawyers—even the nonjurists—at least incomplete, if not to say worthless. Even now that Continental literature begins to give more attention to cases, the case is never more than an illustration in a theoretical, systematic treatment of a

problem, but in the American literature the cases are the very heart of the exposition. And today the "case" has a new significance: the proof of positivism. The American literature restricts itself sometimes to giving the cases and is extremely cautious in conclusions, in the formulation of positive norms of the law of nations.

Just as the "case law" of the United States needs an enormous, sometimes purely commercial, amount of publication, and furthermore of keys, guides, and so on—otherwise no one could find his way through the nightmare of the continually increasing number of cases—so the American science of international law is dominated by the demand for *documentation*. The continuous publication of documents and materials in scientific journals, in pamphlets of the International Conciliation or World Peace Foundation, or in separate great publications is, therefore, characteristic of the American science of international law. So is publication of municipal cases, of prize cases,<sup>24</sup> of the decisions of international tribunals, decisions of mixed claims commissions, collection of treaties;<sup>25</sup> Hudson's four volumes of *International Legislation*<sup>26</sup> ("to make the collective treaties more readily accessible to the legal profession"), Moore's fundamental *Digest*,<sup>27</sup> Moore's equally fundamental series of *International Adjudications, Ancient and Modern*, D. Hunter-Miller's *Treaties and other International Acts of the United States of America*, to mention only a few. To this publication of materials we have to add also, in international law, "guides," "keys," separate index volumes, and so on. As regards documentation, the American science of international law is unquestionably leading and the whole world owes it a great deal of gratitude.

This documentation has far-reaching consequences for the scientific character of the American science of international law: it strengthens the positivistic treatment; it teaches to prove every-

thing by documents; documents are mostly quoted from the original; second-hand quotations are abhorred. The quest for looking up and looking for all available materials is stimulated. The American method of quotation and its accuracy is of a high standard and compares advantageously with the carelessness, unreliability, the impossible typographic errors in quotations in foreign languages—phenomena to be found sometimes in the literature of other countries. It also follows that in the American science of international law a very elaborate index is absolutely *de rigueur*.

The importance of the case in the American science of international law, already a natural consequence of the common-law thinking, has been further emphasized by the complete victory of the American case method, applied to the study of international law at the law schools and, incidentally, even outside of them. And the case method brought the American casebook, from the earlier casebooks of Snow,<sup>28</sup> Scott,<sup>29</sup> and Evans<sup>30</sup> to Stowell-Munro,<sup>31</sup> Dickinson,<sup>32</sup> and Hudson.<sup>33</sup>

But there is a question whether the case method—a method perfectly adequate to the common law as a case law—is really adequate to international law, or whether it is adequate if applied alone and exclusively. For, apart from philosophical reasons of which we will speak later, the case method is a consequence of common-law thinking and of the professional character of American law schools. The case method, therefore, stands for the professionalization of international law; its emphasis is as stated by Manley O. Hudson<sup>34</sup> on “those problems of International Law which most frequently arise in the *practice* of law,” “which must find place in the learning of a practising lawyer.” It follows that whole parts of international law are omitted; that, on the other hand, many things are included which have nothing to do with international law but constitute clearly municipal

law; that the scientific character is subordinated to practical utility. The case method means, further, that the whole international law is narrowed down to judicial decisions—a danger inherent already in common-law learning—and many parts of international law do not come before courts, and particularly not before municipal courts. For the case method has the greater danger of restricting its materials to municipal decisions, and of further restricting the materials—as the casebooks by Evans and Scott—to cases taken from English and American courts. Therefore, if the case method exclusively is applied to international law, it implies, to a certain extent, the sacrifice of completeness, of a truly scientific character, and of a truly international approach. International law, as a subject matter of teaching and research, is, therefore, sometimes not so much international law as what the American diplomatic practice and American and British courts consider to be international law.

Municipal cases, which may also be clearly violative of international law, are by their very nature unapt to form the exclusive basis for the teaching of and research in international law. Municipal cases, which sometimes, in the words of Edwin M. Borchard, are only an illustration of what international law is *not*, constitute for international law only raw materials. All documents and materials, moreover, for which the American activity of documentation does so much, are, it must be emphasized, only raw materials. Overemphasis on documentation may bring the danger that the whole activity is exhausted by a mere compilation of materials and does not proceed to the scientific handling of those materials; to confuse, in the words of G. Grafton Wilson, “research *i.e.* an attempt to extend the bounds of human knowledge with a mere gathering of materials.”<sup>35</sup> Documentation is an absolutely necessary prerequisite; but, to speak with Justice Oliver Wendell Holmes<sup>36</sup> “the mark of the master is

that facts which before lay scattered in an unorganic mass, when he shoots through them the magnetic current of his thought, leap into an organic order, and live and bear fruit." The international lawyer, in the words of Borchard,<sup>37</sup> "needs materials, but he needs how to use . . . how to value materials. No index or no guide can give a man judgment or capacity."

The concentration in international law on municipal cases has the further danger of a confusion between municipal and international law. It is to be protested that international treaties are many times regarded as "contracts," and Hudson's protest against this conception, which is inadequate in itself and overlooks the legislative quality of the international treaty, is fully justified. Very many decisions of the United States Supreme Court, decisions which involve points of international law, are splendid in the development of its norms; but in some decisions we see an untenable confusion between the law of landlord and tenant and the law of territorial changes under international law.<sup>38</sup>

The predominance of the case in the American science of international law has as a further consequence sometimes caused the neglect of other sources of international law. Just as the common-law literature, while gathering all possible cases since the Norman period, almost ignores the statutory law, the American international lawyer sometimes neglects the international treaties, or looks on them as not being international law in the strict sense. In recent times, however, the American science of international law has begun to do justice to international treaties.

The predominance of the case explains further why the American science of international law, as compared with the European science, relatively neglects the literature. This is analogous to the same neglect in the literature on common law. It is further to be explained by the respect for documentation, so that even where use is made of the literature, scientific works are often quoted as



"secondary sources." Perhaps through the fear of inadequate documentation, it is sometimes thought that it does not matter what an author, however important, says; the primary sources should be consulted. This neglect of the literature is not an advantage. First of all it is a little paradoxical, for if the reasons behind it are justified, it is difficult to understand why American international lawyers write books at all. But apart from this, it is the duty of the scholar, who never is more than a link in the never-ending chain of his science, to take account of the scientific thinking of his time and not to lose the connection with the thought of scholars who preceded him. It must be added that in international law, more than in other branches of the law, the literature has influenced the development of the law itself.

The use of the cases is, of course, in itself highly valuable, and in this the Continental science has a good deal to learn; in America, on the other hand, it is necessary to realize that sources other than cases and the scientific literature must not be neglected. It is further necessary here to avoid the dangers of too great an emphasis on cases, dangers of which the American science of international law is well aware. That this is so is proved by the remarkable change in contents in modern casebooks, by the growing use of municipal decisions other than British and American and of decisions of international tribunals, and by the inclusion of international treaties. There is also a growing interest in literature, English and foreign, new and old; we need point only to the great series of "Classics of International Law," published by the Carnegie Endowment for International Peace. Further proof is given by the discussion of the case method in international law. The resistance comes, first of all, from the camp of the nonjurists. But not only are the arguments advanced by Charles G. Fenwick, Amos T. Hershey, J. Wilford Garner, Charles E. Martin, and Quincy Wright mostly justified, but they are also

recognized by the jurists among the American international lawyers: "The case-method," said Edwin M. Borchard,<sup>39</sup> "at least so far as concerns cases decided by municipal Courts, was not appropriate, certainly in the highest degree, to International Law."

### III

We have, up to now, tried to explain the particular character of the American science of international law from the fact that it is composed of non-lawyers as well as lawyers, and that the latter are, of course, also under the influence of the system and the methods of the common law and of the professional character of American law schools, facts that make themselves felt even among the non-lawyers.

But in order to get a full understanding it is necessary to go deeper, to the very philosophical basis. The common law established in England and inherited in America, built upon individual cases, is but one particular expression of a fundamental mental attitude, common to Britain and America, of a basic conception; it is the method of thinking from the particular to the general, in full contrast with, let us say, the French, German, or Italian mind, which thinks from the general to the particular. This difference is clearly expressed in the unwritten British constitution, in the common law, and in British policy which avoids drawing up beforehand programs or treaties covering all possibilities, but which is satisfied to deal with every problem as it arises, in as good a manner as possible, using largely the democratic device of compromise and having no fear of coming to difficulties with logics, looking at the world from a practical point of view. It is true that the United States has a written Constitution which, together with the French Declaration of the Rights of Man, is the outstanding historical example of a *jus naturae* thinking, whereas Disraeli remarked that the rights of

Englishmen are five hundred years older than the Rights of Man and are not based on a theory taken from the work of philosophers but "broadened down from precedent to precedent." Nevertheless, in spite of the Constitution, American Constitutional law is mostly "case law" of the United States Supreme Court: "The great generalities of the Constitution," to quote Justice Benjamin N. Cardozo,<sup>40</sup> "have a content and a significance that vary from age to age."

It is from this basic mental attitude that much in the creations of the Anglo-American mind has to be explained, in other fields as well as in the field of the law: the enmity against theoretical systematic thinking, the neglect—nay, the disgust—of philosophy. The word of Dicey, that "jurisprudence is a word which stinks in the nostrils of a practising barrister," is well known. It is this hostility toward theory that distinguishes the American science of international law so much from the Italian or the "Vienna school."<sup>41</sup> That is the reason why in the American science such fundamental topics as the foundation and basis, the reason or validity of international law, its relation with municipal law are never discussed.

This basic mental attitude naturally leads to the overemphasis of the "practical," in law too. "The field of law," says Bingham,<sup>42</sup> "is the field of a practical science." "Law is a *practical* matter," says Roscoe Pound.<sup>43</sup> Yes, but *the law is not identical with the science of the law*. Every science is essentially theory; at the very basis of every action, however practical, is always theory, and no science is possible without philosophy. To have introduced the philosophy of law into American law schools will always remain the outstanding achievement of Dean Roscoe Pound. For "philosophy of law lies at the base of all divisions of legal science."<sup>44</sup> The overemphasis on the "practical" leads not only to an enmity, but to a real fear of theory; for the theory of law is often confused

with mere *Begriffsjurisprudenz*, "mechanical jurisprudence." "The analytic study of the general conceptions of the Law," warns Gray,<sup>45</sup> "is not without its dangers, it may easily result in a barren scholasticism." And we see the same fear in international law—that theoretical, *i.e.*, scientific, investigations may perhaps offend some people, may be interpreted as mere mental acrobatics, as a mere *jeu d'esprit* of scholars. "There is the danger," said Manley O. Hudson,<sup>46</sup> "that we should consider our job merely that of intellectual exercise," and Dunn<sup>47</sup> professed: "The legal scientist is engaged in the pursuit of knowledge, not merely to satisfy idle curiosity, but in the belief that such knowledge will be immediately useful in the solution of practical problems."

It is this overemphasis on the "practical" that leads to the professional character of American law schools. Morris R. Cohen<sup>48</sup> speaks of the "pressure of practicality" on American law schools, which "prepare for practical success at the Bar rather than to advance the science of law," which "fear to introduce theoretic studies as remote from immediately practical legal issues." Even at law schools the mere mention that a problem is "purely theoretical," "only of academic interest" means that it is not worthwhile to lose a moment with this problem. But "the primary object of a University can only be the advancement of our legal institutions through the development of a science of the law."<sup>49</sup> "Our Law Schools are still regrettably backward in the philosophic or scientific study of the law"<sup>50</sup> and Cohen speaks of "our foremost legal scholars' deep prejudice of the 'practically' minded against any avowedly theoretical treatment of the law,"<sup>51</sup> and rightly blames the "fashionable but foolish glorification of the practical over the theoretic life."<sup>52</sup> And the protest comes not only from a philosopher but also from jurists. "The most important effort of legal thought is to generalize the cases into a thoroughly connected system," says Justice Oliver Wendell Holmes.<sup>53</sup> "Law"

—according to the same great jurist—“is the calling of thinkers”;<sup>54</sup> “a Law School does not undertake to teach success,”<sup>55</sup> “but the University is the conservator of the vestal fire.”<sup>56</sup> The spirit of “practicality” pervading the whole jurisprudence appears in our particular case as the professionalization of international law.

The overemphasis on the “practical” leads naturally enough to the neglect of methodological problems. Quincy Wright<sup>57</sup> comments in a laudatory manner on the “predominantly practical turn of contemporary International Law,” on his impression “that the bulk of jurists have been more interested in problems rather than in methods,” as if any *scientific* approach to any problem were possible without an adequate method. Every body of knowledge, to quote Kant, is called a science only if it constitutes a *system, i.e.,* a totality of cognitions arranged according to principles, and in order to arrive at a system, not a mere aggregate, we must have a *method*. The neglect of methodological problems is bound to lead sometimes to a confusion of methods, with all its disastrous consequences from a scientific point of view. It must be borne in mind that international law can be approached from a *historical* angle, using historical methods; history of international law is, of course, an entirely legitimate, highly valuable science, indispensable even for the full understanding of our present-day international law; but it is a part of history. It is, further, entirely legitimate to study international law from a *sociological* point of view, but dealing, of course, with facts, working with sociological methods. In such a study we are interested in those facts that have determined the coming into force of a certain international norm; in other words, its effects. It is further entirely legitimate to study international law from a *political* point of view, making subjective proposals *de lege ferenda*. This “politics of international law,” as being practical, has a particularly prominent place in the American science of international law, and rightly so, for

it is of the greatest importance. But in making proposals for the development of international law, two methodological fundamentals have always to be borne in mind: First, no practical proposal *de lege ferenda* is possible without a profound knowledge of the actual law and this, in turn, is not possible without theory. Before making a proposal for the elimination of war, not only must one know the positive law, but one must also understand the theoretical place of war in the old system of international law. Second, a political proposal *de lege ferenda* must be presented strictly as such and must not pretend to give us the law as it is. Under these conditions, it is entirely legitimate for an international jurist to write on problems of politics of international law. But if it is intended to give a *legal* study of international law, such a study necessarily must give us the law *as it is*, and can approach the subject, whether written by a lawyer or a non-lawyer, with no other but *juridical* methods. It is against this, one should think, self-evident postulate that sins are often committed. In the literature on the Kellogg Pact, we read studies that are clearly subjective proposals *de lege ferenda*, but which, nevertheless, pose as objective analyses of the positive law. This confusion of methods cannot advance the science of international law. We may heartily sympathize with the lofty ideals of the writer, but if he tries to present them not as his wish as to what the law *should* be but as a statement of what the law *is*, we must call it bad science. The *legal* study of international law has to deal with the *law*, and with nothing else.

Not only a confusion between jurisprudence and politics of law, but also—another methodological sin—a confusion between jurisprudence and ethics can often be seen. It is a very different thing to state, as a jurist, the law as it is and to give, as a moralist, a critique of the positive law from the law-transcending standpoint of ethics. As an example we quote the rule: *pacta sunt ser-*

*vanda*. The *legal* study of this rule has to deal with the law; the *moral* valuation is quite a different thing. But many writers on the "sanctity of treaties" adopt from the beginning a metajuridical, ethical pathos, which must lead them to untenable positions. For the jurist, it is perfectly proper to state that even peace treaties ruthlessly imposed by force are valid in positive law and, therefore, must be kept; but from the *moral* point of view—which is *not* the jurist's point of view—treaties imposed by force are, of course, profoundly immoral.

Even, where the overemphasis on the "practical" rules, philosophy cannot be avoided, for he who states that he despises philosophy or does not care for it makes, by saying so, a philosophical confession. But the practical point of view will turn out in a corresponding philosophy—utilitarianism in England, pragmatism in America. Pragmatism is, therefore, to a great extent at the basis of American juridical thinking. "We have to attain a *pragmatic* legal science," states Roscoe Pound<sup>58</sup> programmatically. And Cardozo<sup>59</sup> states that "the juridical philosophy of Common Law is at bottom the philosophy of pragmatism," that "by emphasizing standards of utility, by setting up the adaptation to an end as a test and evidence of verity, pragmatism is profoundly affecting the development of juristic thought."<sup>60</sup>

It is on this philosophical basis that the inductive method alone is often considered as a scientific method and that, therefore, the case method is considered to be an inductive method and that its scientific character is allegedly justified by the inductive character of this method. And such fundamental conceptions in the whole field of jurisprudence find, of course, their way into the American science of international law.<sup>61</sup> "The doctrine of precedents," writes Roscoe Pound<sup>62</sup> "means that causes are to be judged by principles reached *inductively* from the judicial experience of the past." "The method of the Common Law," says Cardozo,<sup>63</sup> "is

*inductive* and it draws generalizations from the particulars." But this attitude is erroneous. "The introduction of the 'case-method' in law teaching means the entrance of *inductive* scientific methods in law. The latter view is, however, *obviously a misapprehension*."<sup>64</sup>

This inductive prejudice is closely tied up with the overestimation of *natural sciences* as the truly, *i.e.*, only, scientific method. Hence, it is argued, if jurisprudence wants to be a science at all, it cannot but be a natural science. This superstitious belief is caused partly by the enormous progress made by natural sciences and partly by the "pressure of practicality." And this form of thinking also leads, in law, to an antitheoretical attitude, which is in its turn responsible for an overestimation of mechanical progress, of mere civilization, of a confusion of civilization with culture, of the belief that pure research in law can be done mechanically in "laboratories." In all these beliefs change is necessary. For "our culture is what we are, our civilization is what we use; culture is the fulfilment of life, revealed in things we want in themselves and not in their results."<sup>65</sup> And culture expresses itself in art, in philosophy, in science. "The justification of art is not that it increases the supply of wine or oil. The justification of art is in art itself." "Art, science and philosophy are themselves deep necessities as well as the finest fruit of the specifically human life."<sup>66</sup>

The antitheoretical stand is already fallacious within the realm of natural sciences. The research worker, the physical scientist must not be confused with the engineer. The wheels of no machine, however practical, could run without the previous most abstract and theoretical research in mathematics. On the other hand, the conception of "law as an inductive science," the "parallel between law and natural science"<sup>67</sup> is obviously fundamentally wrong. "The analogy between legal and physical science, so frequently drawn by modern American lawyers in their discussions



of method is, in everything that concerns nature and method, inaccurate. The end arrived at in these modern sociological investigations is *not at all legal science*."<sup>68</sup>

The pressure of practicality, the antitheoretical attitude, the pragmatic basis, the erroneous analogy between legal and natural science, the presupposedly "inductive" methods, coupled with the nature of the common law as "case law" and the victory of the "case method" have brought about in America a widespread philosophy of law which is called "realistic," "behaviorist," "instrumentalist," "pragmatist," "sociological." It is to be found in different shades and degrees of intensity in the writings of many of the most prominent present-day thinkers in American legal science, among the earliest of whom is Bingham.<sup>69</sup> Legal science, in the opinion of these writers, is possible only by the "observation of facts"; there are no general rules or principles of law; the decision of the Court is identified with the "behavior of the judge." "A realistic understanding is possible only in terms of observable behavior"; for "the real rules are descriptive not prescriptive, they are on the level of isness and not of oughtness."<sup>70</sup> "The judge is an investigator as was Sir Isaac Newton."<sup>71</sup> "We as lawyers like the physical scientists are engaged in the study of objective physical phenomena."<sup>72</sup> Not to speak of Frank's *Law and the Modern Mind*.<sup>73</sup>

Now this whole "nihilistic" doctrine is, of course, from a philosophical, theoretical, and methodological point of view fundamentally fallacious and must necessarily lead to a complete confusion between legal science and sociology. This doctrine has also been refuted with strong and unimpeachable arguments by many American thinkers—Roscoe Pound, John Dickinson, Albert Kocourek. "A definition of law," writes Benjamin N. Cardozo,<sup>74</sup> "which in effect denies the possibility of law since it denies the possibility of rules of general operation must contain within itself

the seeds of fallacy and error." "Even if the behaviorists succeeded, they would have a descriptive sociology, not a juristic science."<sup>75</sup>

It is, of course, not here intended to go into the details of the "realistic" school. But it must be mentioned as giving one more key to understand the American science of international law. For as this "realistic" school is widely accepted and as, in the correct words of Kocourek, "philosophy of law lies at the base of all divisions of legal science,"<sup>76</sup> it is only natural that this "realistic" conception should make itself felt in the science of international law. A good example is W. W. Cook's paper: "The Legal Method"<sup>77</sup> and it is perhaps more astonishing that this paper, presented at a conference of American Teachers of International Law, met with little fundamental opposition.

The pressure of practicality and pragmatism have led, in American philosophy of law, not only to the confusion of legal and sociological methods, as represented by the "realistic" school, but also to a confusion between law and politics or morals, as represented by the "teleological" school, and have led also to the conception, in Dean Pound's words, of "law as a means toward social ends," in his attack against the "analytical" and his praise of the "functional" method. Pound's theories are to be accepted fully, with one important reservation: What he is asking for is not legal science but *politics* of law, science of legislation. It deals not with the statement of the law that is, but with political postulates as to what the law should be. It is not the task of legal science, but the task of the very different *science of legislation* "to investigate legal and social phenomena in order to discover how desirable social ends may best be achieved."<sup>78</sup>

Here again, as philosophy of law lies at the base of all divisions of legal science, this attitude must have its repercussions on the American science of international law. And Dean Pound himself

has made the application of his philosophy to international law.<sup>79</sup> He speaks of the futility of the attempt to exclude creative finding of the law and reference to ideals of what international law should be. In beautiful and inspired language he makes a case against repeating always the received doctrine of the books; against the jurists of the nineteenth century who provided no leadership where leadership was needed; he speaks in favor of a creative philosophical juristic thought analogous to that of Grotius in that it would apply creative philosophical ideas to set up a picture of what we may and should do and would invite creative juristic effort to shape existing legal institutions and to make *new* ones in that image. He stands against juristic pessimism; he sets international lawyers a great task of social engineering, a *functional critique* of international law in terms of social ends, not an analytical critique in terms of itself. "Our chief need is a man with that combination of mastery of the existing legal materials, philosophical vision and juristic faith which enabled the founder of International Law to set it up almost at one stroke."<sup>80</sup>

Dean Pound, whose great achievement it is to have given to philosophy of law a standing in American law schools, has also greatly furthered the philosophical treatment of international law.<sup>81</sup> It is easily to be understood that the enormous authority of this great thinker and profound scholar has widely influenced the American science of international law, that his postulate of a "functional approach" has been adopted textually by many international lawyers.<sup>82</sup>

The American science of international law has made enormous progress. And perhaps the greatest evidence of its progress is the fact that its most prominent representatives are not satisfied with the progress already achieved, but set for their science a higher aim; that they demand an improvement of legal scholarship, a promotion of legal research, a philosophical basis, a sound meth-

odological approach, an approach along truly international lines, a higher standard, a development of the critical attitude, a progress from the professional to the scientific character. Critique and aim have been given in the words of Edwin D. Dickinson:<sup>83</sup> "International Law in the American Law School is a curricular luxury. It is actually affecting a very small percentage of the law students. . . . It is the result of the type of Law School training which we have developed in this country . . . for the training of legal technicians. We have placed an extraordinary emphasis upon the mechanics of law practice. It may well be doubted whether we have perfected a training which is adequate for the preparation of a well-rounded and well qualified lawyer. . . . Great progress has been made in instruction in International Law in America in the past century, but this progress has been essentially superficial. . . . An institution for higher International Studies is very much needed in America."

## NOTES

<sup>2</sup> Cf. Gregory, *The Study of International Law in Law Schools* (1907) 2 AM. L. SCHOOL REV. 41.

<sup>2</sup> Cf. SYMONS, COURSES ON INTERNATIONAL AFFAIRS IN AMERICAN COLLEGES (1931). Introduction by J. T. Shotwell; SAVORD, DIRECTORY OF AMERICAN AGENCIES CONCERNED WITH THE STUDY OF INTERNATIONAL AFFAIRS (1931); WARE, THE STUDY OF INTERNATIONAL RELATIONS IN THE UNITED STATES (1934).

<sup>3</sup> Detailed enumeration in KUNZ, *Die nordamerikanische Völkerrechtswissenschaft seit dem Weltkrieg* (Vienna, 1934) 14 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 318-351. This article includes Canada.

<sup>4</sup> Cf. Report by HUDSON, PROCEEDINGS OF THE THIRD CONFERENCE OF AMERICAN TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS (1928) 178-189.

<sup>5</sup> EAGLETON, INTERNATIONAL GOVERNMENT (1932).

<sup>6</sup> Remark by COLEGROVE, in PROCEEDINGS OF THE FIFTH CONFERENCE OF AMERICAN TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS (1933) 97.

<sup>7</sup> Eagleton, Book Review (1934) 28 AM. J. INT. L. 810.

<sup>8</sup> Cf. KUNZ, *loc. cit. supra* note 3.

<sup>9</sup> INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (1922) (2 volumes).

<sup>10</sup> E.g., BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916), which has become a universal standard work; DICKINSON, EQUALITY OF STATES IN INTERNATIONAL LAW (1920); RALSTON, LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS (1926);

EAGLETON, RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928); JESSUP, LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION (1927).

The American science of international law has made very important contributions to the literature on the League of Nations, the International Labor Organization, the Permanent Court of International Justice. Merely as examples see: HUNTER-MILLER, THE GENEVA PROTOCOL (1925) and THE DRAFTING OF THE COVENANT (1928); WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS (1930); HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE (1934); SHOTWELL, THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION (1934); WILLOUGHBY, THE SINO-JAPANESE CONTROVERSY AND THE LEAGUE OF NATIONS (1935).

Particular mention must be made of the publications of the Research in International Law, Harvard Law School, combining proposals in the form of draught-conventions with a rich compilation of cases, opinions of writers, dogmatic and historic exegeses. The first series (1929) relates to Nationality, Responsibility of States, Territorial Waters; the second series (1932) deals with Diplomatic Privileges and Immunities, Piracy, Position and Function of Consuls, Competence of Courts in Regard to Foreign States; the third series (1935) treats Extradition, Jurisdiction with Respect to Crimes, the Law of Treaties. A new series is in preparation, which will include Recognition of States and Governments, and Neutrality.

<sup>11</sup> 1920 (2 volumes).

<sup>12</sup> 1924.

<sup>13</sup> 1928.

<sup>14</sup> Cf. LANSING, WAR MEMOIRS (1935); MILLIS, ROAD TO WAR, AMERICA 1914-1917 (1935); BAKER, WOODROW WILSON'S LIFE AND LETTERS. NEUTRALITY 1914-15 (1935). Cf. also the investigations of the Nye Committee in the United States Senate.

<sup>15</sup> Cf. HYNEMAN, THE FIRST AMERICAN NEUTRALITY (1934); I SAVAGE, POLICY OF THE UNITED STATES TOWARD MARITIME COMMERCE IN WAR, 1776-1914 (1934); CRECRAFT, FREEDOM OF THE SEAS (1935).

<sup>16</sup> JESSUP AND DEAK, THE ORIGINS (1935); PHILLIPS, THE NAPOLEONIC PERIOD (1936); TURLINGTON, THE WORLD WAR PERIOD (1936); JESSUP, TODAY AND TOMORROW (1936).

<sup>17</sup> Apart from the well-known books by Levinson (1922), Morrison (1927), Myers (1929), Hunter-Miller (1929), and Shotwell (1929), hundreds of articles of the two schools could easily be quoted.

<sup>18</sup> Cf. Justice Holmes, "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the Courts." *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511 (1909).

<sup>19</sup> "Even the Law of Nations, the widest reaching of all, is a law only in name. It has but a moral sanction, and the only tribunal that undertakes to enforce it is the armed hand, the ultima ratio regum." *Forcpaugh v. Delaware, Lackawanna & Western Railroad Co.*, 128 Pa. 217 (1889) (Pa. Sup. Ct.).

<sup>20</sup> SCOTT, CASE BOOK (1902, 1922) V.

<sup>21</sup> MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924) 291.

<sup>22</sup> Cf. Dickinson, *The Doctrine of Incorporation* (1932) 26 AM. J. INT. L. 239-260.

<sup>23</sup> Cf. "The Common Law includes those principles, usages and rules of action applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature"

(1 KENT, COMMENTARIES 471), and BLACKSTONE COMMENTARIES (1, 67) speaks of the "Common Law, or *lex non scripta*."

<sup>24</sup> Scott's three volumes, 1923.

<sup>25</sup> Hill, 1922; Mac Murray, 1921.

<sup>26</sup> 1931.

<sup>27</sup> 1906.

<sup>28</sup> 1893.

<sup>29</sup> 1922.

<sup>30</sup> 1922.

<sup>31</sup> 1916.

<sup>32</sup> 1929.

<sup>33</sup> 1929.

<sup>34</sup> CASES AND OTHER MATERIALS ON INTERNATIONAL LAW (1929) v. vi.

<sup>35</sup> *Op. cit. supra* note 4, at 38.

<sup>36</sup> COLLECTED LEGAL PAPERS (1920) 37.

<sup>37</sup> *Op. cit. supra* note 6, at 177-178.

<sup>38</sup> *Cf. Wilson v. Shaw*, 204 U. S. 24, 27 Sup. Ct. 233 (1907), where the construction of the legal status of the Canal Zone under the treaty with Panama is not only wrong, but where it is also said that "it is hypocritical to contend that the *territory* does not belong to the United States, because of the omission of some of the technical terms used in *ordinary conveyances of land*." But see also *Canal Zone v. Coulson*, 1 C. Z. Sup. Ct. Rep. 50, which gives an internationally correct statement of the status of the Canal Zone, concludes "that the United States is not the *owner in fee simple* of the Canal Zone." (Italics inserted.)

<sup>39</sup> *Op. cit. supra* note 6, at 183-184.

<sup>40</sup> CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 17.

<sup>41</sup> *Cf. Kunz, The Vienna School and International Law* (1934) 11 N. Y. U. LAW QUARTERLY REV. 370-421.

<sup>42</sup> Bingham, *What Is the Law?* (1912) 11 MICH. L. REV. 78.

<sup>43</sup> Pound, *Juristic Science and Law* (1918) 31 HARV. L. REV. 1058.

<sup>44</sup> KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW (1930).

<sup>45</sup> GRAY, THE NATURE AND THE SOURCES OF THE LAW (2d ed. 1921) 2.

<sup>46</sup> *Op. cit. supra* note 6, at 94.

<sup>47</sup> *Id.* at 95.

<sup>48</sup> Cohen, *Law and the Social Order*, ESSAYS IN LEGAL PHILOSOPHY (1933) 185.

<sup>49</sup> *Id.* at 186.

<sup>50</sup> *Id.* at 352.

<sup>51</sup> *Id.* at 327.

<sup>52</sup> *Id.* at 364.

<sup>53</sup> HOLMES, *op. cit. supra* note 36, at 168.

<sup>54</sup> *Id.* at 29-30.

<sup>55</sup> *Id.* at 36.

<sup>56</sup> *Id.* at 275.

<sup>57</sup> RESEARCH IN INTERNATIONAL LAW SINCE THE WAR (1930) 31, 33.

<sup>58</sup> Pound, *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 609.

<sup>59</sup> CARDOZO, *op. cit. supra* note 40, at 102.

<sup>60</sup> CARDOZO, THE GROWTH OF THE LAW (1924) 127.

<sup>61</sup> Cf. the preface to STOWELL-MUNRO, CASES, OF GRAHAM, IN QUEST OF A LAW OF RECOGNITION (1933) 6: "The quest thus dictated its own method; an inductive survey of the post-war practice of nations regarding the recognition of new States."

<sup>62</sup> THE SPIRIT OF THE COMMON LAW (1921) 205.

<sup>63</sup> CARDOZO, *op. cit. supra* note 40, at 22-23.

<sup>64</sup> COHEN, *op. cit. supra* note 48, at 170.

<sup>65</sup> MAC IVER, THE MODERN STATE (1926) 325-326.

<sup>66</sup> COHEN, *op. cit. supra* note 48, at 364.

<sup>67</sup> But see Dickinson, *The Law Behind the Law* (1929) 29 COL. L. REV. 113-146, 285-319.

<sup>68</sup> REDLICH, THE COMMON LAW AND THE CASE-METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS (1914) 54 *et seq.*

<sup>69</sup> Bingham, *supra* note 42, at 1-25, 109-121. "The chain of causal facts and their actual legal effects are concrete phenomena in the external world analogous to the experimental phenomena of the scientist" (*id.* at 20), "confusing error of conceiving the laws as a system of rules and principles" (*id.* at 121).

<sup>70</sup> Llewellyn, *A Realistic Jurisprudence* (1930) 30 COL. L. REV. 431-465.

<sup>71</sup> GRAY, *op. cit. supra* note 45, at 99.

<sup>72</sup> Cook, *The Logical and Legal Basis of the Conflict of Laws* (1924) 33 YALE L. J. 475.

<sup>73</sup> 1930. Cf. the highly interesting "Symposium" on this book, by Llewellyn, Mortimer J. Adler, and Cook (1931) 31 COL. L. REV. 82-115.

<sup>74</sup> CARDOZO, *op. cit. supra* note 40, at 127.

<sup>75</sup> COHEN, *op. cit. supra* note 48, at 205.

<sup>76</sup> *Op. cit. supra* note 44.

<sup>77</sup> *Op. cit. supra* note 6, at 50-57.

<sup>78</sup> KOCOUREK, *op. cit. supra* note 44, at 37.

<sup>79</sup> Cf. *The Part of Philosophy in International Law* (1927) PROCEEDINGS OF THE SIXTH INTERNATIONAL CONFERENCE OF PHILOSOPHY 372, and *Philosophical Theory and International Law* (1923) I BIBLIOTHECA VISSERIANA.

<sup>80</sup> *Supra* note 79, BIBLIOTHECA VISSERIANA, at 90.

<sup>81</sup> Cf. Dumbauld, *The Place of Philosophy in International Law* (1935) 83 U. OF PA. L. REV. 290.

<sup>82</sup> Cf. Fenwick, Proceedings of the Second Conference of American Teachers of International Law and Related Subjects (1925) 69; Jessup, Proceedings of the Third Conference (1928) 134. Hudson, *The Prospect of International Law, in the XXth Century* (1925) 10 CONN. L. Q. 419-454: "The future law of nations must seek contributions from history, political science, economics, sociology, social psychology if it would keep pace with the society which it serves" (*id.* at 435). "A sound philosophical basis for the International Law of the XXth Century can only result from a functional critique of International Law in terms of social ends." "We must know the ends that our International Law is to serve" (*id.* at 436). But it should be observed that the author here speaks of international law, not of the science of international law.

<sup>83</sup> *Op. cit. supra* note 6, at 117-122.

THE CENTURY OF  
ANALYTIC JURISPRUDENCE SINCE  
JOHN AUSTIN

ALBERT KOCOUREK

INTRODUCTION

ONE of the scientific differences between a primitive and a developed system of law rests on the amount of conceptual apparatus regularly employed in the administration of justice. In a primitive system, the stock of concepts is scanty. In a developed system of law, the number and variety of concepts have grown to such proportions that they have never by any one been isolated and catalogued in a complete system. For the purposes of legislation the mass of these notions becomes definitely enlarged in an important way. In an ultimate analysis they reduce to (1) interests;<sup>1</sup> (2) methods of protection of interests; and (3) legal rules.

The distinction between primitive and developed law may be put in another way. In primitive administration of law, the judicial sentence operates directly upon the wrongdoer on the basis of a body of religious ideas, clan custom, the *Rechtsgefühl* of the judge, his ideas of policy, or some combination of these factors. As Schopenhauer has pointed out, law begins with the idea of wrong and not of right. The complainant comes before the magistrate, priestly or secular, alleging not the violation of a right but the commission of a wrong. Behind this shade of verbal distinction lie the most significant differences of substance and millenniums of unrecorded history.<sup>2</sup>

In any developed system of law there are three kinds of ideas which are at the basis of a structure of legal rules either in exist-

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ence or in the process of becoming. First there are the ultimate concepts of the irreducible elements of the legal system. Next there are the institutional complexes of ideas which cluster around such interests as have been accorded legal protection (*e.g.*, corporal freedom, suretyship, marriage, etc.). Lastly, there are the operative ideas which represent creation, alteration, and destruction of rights (*e.g.*, consent, negligence, estoppel, etc.). The first set of ideas are the premisses of the other two, which bear to each other the relation, let us say, of noun and verb, or, to use another figure, of static and dynamic.

The scope of what has been called analytic jurisprudence has been generally restricted to the first set of ideas—the ultimate and irreducible notions of legal systems. These ultimate ideas may now be enumerated. They are State, Sovereignty, Law, Jural Relationship, Personateness, Fact, and Thing. Literary practice in recent decades has separated the first three elements from the four remaining elements under some such label as theory of law, theoretical jurisprudence, or *allgemeine Rechtslehre*. Nearly each one of these ultimate notions has been the starting point of separate and specialist treatment represented today by an enormous literature in all European and a few Oriental languages.<sup>3</sup>

Of analytic jurisprudence it may be said that the term is neither satisfactory nor descriptive of its subject matter. It seems probable that the term "analytic" was borrowed from chemistry, but it may be suggested that chemistry as a science is neither analytic nor synthetic. These words simply denote methods of work of the operator in the field of the science. As for the term "jurisprudence," it is well known that the prevalent variance of meanings attached to it has well-nigh destroyed its availability for scientific use.

The phrase "philosophy of law" is in no better case. It is sometimes used as a synonym of jurisprudence,<sup>4</sup> at other times as indicating a field larger than jurisprudence, and, again, as pointing out a field of knowledge or speculation quite apart from jurisprudence.<sup>5</sup>

In recent years conceptualism in law or *Begriffs-jurisprudenz* has suffered in various quarters a heavy attack. Much has been written on this subject and a good deal could now be said, but we shall rudely dispose of that controversy by the affirmation—and the debate deserves no more—that a civilized system of law cannot dispense with an organized system of concepts, and, we may add, that the technical structure of a developed system is purely one of concepts. To abolish legal concepts, if that were possible, would mean a reversion to the first stages of the growth of law.

It needs to be noticed in these introductory remarks that while much has come to pass since the time of John Austin, the results are scanty in comparison with what remains to be done. The field of what is known as analytic jurisprudence needs the co-operative researches of competent and interested scholars in all parts of the world. A fairly complete formal jurisprudence will not be achieved until all basic ideas of the law have been isolated and treated as respects their logical forms<sup>6</sup> and have been carried forward to a treatment of all the varieties of interests which come or may come within the range of legal protection.<sup>7</sup>

The final preliminary observation may be made that analytic (or formal) jurisprudence in the strictest sense is concerned only with the forms of law, that is to say, the concepts necessary to a material embodiment of law in the shape of legal rules, and it is not concerned with the rules of law themselves, their causes, their ends, or their justification.<sup>8</sup>

## JOHN AUSTIN

The story of the life of John Austin (1790-1859), in "which there is little but disappointment and suffering to relate," as told by that faithful and noble companion, Sarah Austin, is a poignant recital of disillusion on one hand and indefatigable zeal to perpetuate the memory of a great man on the other.<sup>9</sup> It can little be doubted that but for Sarah Austin, the reputation of John Austin would hardly have risen above that of a Filmer or a Godwin. Another circumstance that assisted to perpetuate his name in the annals of legal science was the fact that among his auditors in his brief career as a teacher at University College were such men as John Stuart Mill, Sir Samuel Romilly, Charles Buller, and various others, who later achieved professional reputations of their own and who left memorials of their appreciation of Austin's abilities. If Austin was surprised and disappointed to find so little interest in his lectures in 1832 at University College, and again in 1834 at the Inner Temple, we believe he would have been vastly amazed if he could have known that a century later, in spite of the growth in the number of law schools and the developments in the arts and sciences, professional interest in his subject had not increased in the slightest degree. He would have found that the surrounding conditions for the growth of such an interest at large had grown very much worse in this—that the attitude toward classical studies, mathematics, and logic had definitely declined to a state of marked indifference except among specialists.

Austin's lasting fame rests on two theoretical elaborations or clarifications: (1) of the nature of sovereignty, and (2) of the nature of positive law.

Austin defines law in the juridical sense as follows:

"A law is a command which obliges a person or persons . . . and obliges *generally* to acts or forbearance of a *class*."<sup>10</sup>

It will be observed that Austin here gives a definition of *a* law and not of *the* law.<sup>12</sup> The question suggested is whether *the* law is only the sum total of laws, or whether it embraces other elements.

Speaking of the nature of a command, Austin says that the term command comprehends:

"1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former and to be incurred by the latter, in case the latter comply not with the wish. 3. An expression or intimation of the wish by words or other signs."<sup>13</sup>

"It also appears . . . that *command*, *duty*, and *sanction* are inseparably connected terms: that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series."<sup>13</sup>

These are typical statements of Austin's imperative theory of the nature of a law. These statements are repeated over and over in changing phrases.

As is well known, Austin's view in various quarters met violent criticism. One, by Frederic Harrison,<sup>14</sup> attacks the Austinian view as inapplicable to various types of legislative declarations. We believe Mr. Harrison's criticism is substantially lacking in merit, but Austin, it must be admitted, opened the way for such criticisms by his failure to isolate and analyze the different types of legislative declarations. It seems now to be generally admitted, though not without occasional dissent, that a juridical law requires the logical elements of command, duty, and sanction.

Another variety of criticism was voiced by Sir Henry S. Maine,<sup>15</sup> who, citing the instance of Runjeet Singh, attempted to show that political societies may exist and endure without sovereignty or law in the Austinian meaning.<sup>16</sup> Maine's criticism is difficult to meet, and, if Austin is taken literally, probably cannot be over-

come. We shall, for a moment, reserve that point and state briefly Austin's theory of sovereignty. Says Austin:

"Sovereignty is distinguished from other superiority, and from other society, by the following marks or characters:

"1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons.

"2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior."<sup>17</sup>

The question of sovereignty is one of first-rate practical importance not only in international law but also in constitutional law.<sup>18</sup> In American constitutional theory, the nature of sovereignty is a question of great difficulty,<sup>19</sup> and it has not yet had adequate scientific consideration. An extensive literature on sovereignty has come into existence,<sup>20</sup> but the Bodin-Hobbes-Austin proposition, "that 'sovereign power is incapable of legal limitation,'" while often denied,<sup>21</sup> is an inescapable proposition of logical truth. There can be nothing more ultimate than ultimateness.

We come now to the point above reserved. It will have been noticed that Austin, in his definitions of law and of sovereignty, speaks of persons, wishes, commands, determinate superior, etc. Austin saw no distinction between the State and the government. The word "state" is not discussed or analyzed by Austin,<sup>22</sup> and it seems to be clear that so far as the idea was presented to him, it was simply the synonym of a government or a political society. Because of this failure to distinguish the State from political society, Austin was driven—perhaps, as he thought, by logical necessity—to invent the category of absolute duties where "there is no *person*, individual or complex towards or in respect of whom the duty is to be observed."<sup>23</sup> What may have seemed log-

ical necessity resulted in logical incoherence, since a duty without a correlative claim (or right) is impossible and, therefore, unthinkable.<sup>24</sup>

It is not easy to understand how Austin escaped discovering the conceptual nature of the State and of sovereignty. He was familiar with the "fictitious persons" known in Roman law as *universitates* or *collegia*.<sup>25</sup> It is also probable that he was familiar with the leading case in Coke.<sup>26</sup> Whatever the explanation, he missed a truth, implicated in his method of reasoning, that would have put his theories of law and of sovereignty in a position above the possibility of successful attack. The view that Austin missed has only in recent years been clearly elaborated,<sup>27</sup> but the new conceptual extension is merely a step in advance of what Austin, on a lower level of legal observation and analysis, had already discovered.<sup>28</sup> We believe it is entirely right to say that in substance Austin's analyses are correct and that he deserves to be accorded the rank of primate in the field under discussion.<sup>29</sup>

#### AUSTIN'S SUCCESSORS

One of the first of Austin's successors was Sir William Markby (1829-1914) who, in 1871, published his *Elements of Law Considered with Reference to Principles of Jurisprudence*.<sup>30</sup> Markby was called to the bar in 1856. He later became judge of the High Court of Calcutta (1866-1878), and on his retirement became reader in Indian law at Oxford.

As first published, Markby's book, like Austin's, was in the form of lectures representing in considerable part a series delivered by him to Hindu and Mohammedan law students at Calcutta, in the year 1870. In later editions, the lecture divisions gave way to chapters. Markby supports Austin's fundamental theories of law and sovereignty and seeks to defend them against Austin's critics.<sup>31</sup>

Austin laid down not only a theory of law and of sovereignty but the pattern of ideas for treatises on analytic jurisprudence in our own language up to the present day.<sup>32</sup> Markby's excellent book is no exception. It may be regarded as a more modern treatise than Austin's, following in general the Austinian plan of development.

Next in chronological order comes Sheldon Amos (1835-1886) who, in 1872, published his *Systematic View of the Science of Jurisprudence*, and in 1874 *The Science of Law*.<sup>33</sup> Amos was a man of wide learning. He had held Austin's chair at University College and later was judge of the Court of Appeal in Egypt. While he accords to Austin the distinction of being "the true founder of the science of law,"<sup>34</sup> Amos departs from him in important fundamentals. For example, Austin considered international law not as law in the strict sense, but as international morality. Amos, under the influence of Maine, which is evident throughout his work, thinks that law depends not on authority but on the certainty of sanction.<sup>35</sup> The problem still remains.<sup>36</sup> Amos's book, perhaps because of its entire lack of documentation and its admitted popular style, has fallen somewhat into disuse, but it still remains to be reckoned with as an important and valuable contribution.<sup>37</sup>

A considerable advance for the subject matter of analytical jurisprudence and the method of treating this subject matter came with the publication, in 1880, of *Elements of Jurisprudence*<sup>38</sup> by Sir Thomas Erskine Holland (1835-1926).

Holland's book seems to have been the most successful of all jurisprudence books. In the thirteenth edition (1924) this famous text is revised to include some of the most recent legislation in England, including Lord Birkenhead's statute of 1922 "to assimilate and amend the law of real and personal property." Holland's text is confined to a compass of slightly more than four hundred

pages. Another author, at least one writing in the repetitious but yet meticulous style of a John Austin, would have required a series of volumes to deal with the same variety of topics. In spite of its brevity and compactness, Holland's book is a veritable mine of information, especially of a comparative sort, dealing with definitions, theories, and practical rules. Holland is very nearly the last of out-and-out Austinians without change or amendment. No previous writer had access to so rich a mine of materials in foreign systems of law, by virtue of the calendar of time, and no writer of any English text up to his day made more use of such materials. We believe the chief merit of his book rests on that point. In other respects it must be rated an old-fashioned text, which, except for the modernity of its illustrations and references, might have been dated a century earlier. The great value of this notable book, we believe, lies chiefly in the development of a classification under which comparative legal ideas are distributed.<sup>39</sup>

The next important work is *Some Leading Principles of Anglo-American Law*<sup>40</sup> by Henry T. Terry (1847-), professor of law at Tokyo Imperial University (1884). All books on jurisprudence prior to Terry's time had dealt largely or chiefly with materials drawn from civil law or other foreign systems. Terry's book deals almost entirely with Anglo-American legal materials. On the fundamental questions of State, Sovereignty, and Law, Terry is thoroughly Austinian. He escapes Austin's critics by a distinction between rudimentary law and developed law.<sup>41</sup>

"It is plain," says Terry, "that the condition of our law, as to its form, is fast becoming unbearable."<sup>42</sup> His purpose was to analyze fundamental principles and notions of the Anglican system of law so as to "make it possible to explain intelligibly a scheme for the arrangement of the whole of it."<sup>43</sup>

Terry had previously published his *First Principles of Law*,<sup>44</sup> and later *The Common Law*,<sup>45</sup> the latter a ponderous volume of



more than nine hundred pages. Terry became professor of law at Tokyo Imperial University in 1877, remaining until 1884, when he left to practise law in New York City (January 1885). Later he returned to Japan to resume his professorship (May 1894–July 1912). Altogether he remained in Japan about twenty-five years.<sup>46</sup> Terry lived long enough to outlive his fame, or, more accurately, he lived long beyond the period when his fame deserved to be at its height.<sup>47</sup>

There has been something exotic in the careers of nearly all those noticed here who have cultivated analytic jurisprudence. Austin lived and worked as a military man<sup>48</sup> at Malta; later he lived in Germany, and later still, in France. Markby lived in India and was interested in Indian law. Amos lived in Australia, and had an official position in Egypt. Holland supplied an exotic element through his lifelong devotion to international law and through his Continental contacts. And we come now to Terry, who did his best work in a foreign country and spent so large a part of his life in foreign surroundings that he is not recognized, as he deserves to be, as one of the clearest thinkers in law that America has ever produced.

The *Leading Principles* is a great work. It is remarkable for its originality and the acuity of view of its author. When it was written in Japan, Terry seems to have had access to English and Massachusetts's decisions, and it appears that he had carried to Japan a set (or at least numerous volumes) of the Connecticut reports and various American and English textbooks.<sup>49</sup> Whatever his apparatus, it was sufficient for his purpose. No reader of Terry's book, avoiding the title-page and preface, would suspect that it was entirely produced in an Asiatic country. It is altogether unlike any other jurisprudence treatise, before or after, in that it carried down juristic concepts to the ultimate decision of concrete cases.<sup>50</sup> Terry's book is, therefore, more than a treatise on juris-

prudence; it is a practical law book dealing with a great variety of practical legal problems.

Terry is the first jurist writing in English to attempt a systematic exposition of the classes of rights. From Austin up, it was the view that there is a single type of right having, as its correlative, duty.<sup>52</sup> The discovery of classes of rights was for Terry an original creation,<sup>53</sup> although if he had had access to the German juristic literature, he would have found irrefutable evidence of prior discovery.

Terry attempts to isolate four classes of rights as follows:<sup>54</sup> (1) correspondent rights; (2) permissive rights; (3) protected rights; (4) facultative rights. Roughly, correspondent rights are what today are recognized as claim-duty relations. Permissive rights are the same apparently as Hohfeld's privilege (*i. e.*, "the condition of not being under a duty").<sup>54</sup> Protected rights are apparently not rights in the sense of relations but only the objects of what Terry calls correspondent rights.<sup>55</sup>

We see here a powerful mind struggling with a subject matter of considerable difficulty. It was an effort to build new roads through a veritable jungle of legal phenomena.

Next in line of the important works on jurisprudence stands the *Jurisprudence or the Theory of the Law*<sup>56</sup> (1902) of Sir John W. Salmond (1862-1924). This work was written in New Zealand where the author held the office of solicitor-general, and later of judge at the Supreme Court. Salmond was also author of a famous text on the *Law of Torts*<sup>57</sup> (1907) and of various other publications, including *Essays in Jurisprudence and Legal History* (1891).

Salmond was familiar with the Continental literature on many phases of legal science and it was to be expected that one so well equipped in theoretical, comparative, and practical knowledge would produce, in any field of law that he ventured to enter, an

excellent book. The result for jurisprudence does not disappoint the belief. Salmond's treatise is the most readable of all jurisprudence works in any language. It is written in an impeccable idiom and the author made interesting some of the most forbidding aridities of legal science.<sup>58</sup>

Salmond ventures to define law—a path already trodden by companies, if not by battalions. He says: "The law is the body of principles recognized and applied by the State in the administration of justice."<sup>59</sup> This definition, which takes account of the not-at-present-formulated rule or rules and centers all the manifestations of law in the behavior of the courts, marks a departure of first-rate theoretical significance.<sup>60</sup>

Salmond's work is properly subtitled *The Theory of Law*. As such, it is an incomparable intellectual effort. Salmond devoted only a few pages to a discussion of the kinds of rights, but these pages are incisive and valuable.<sup>61</sup>

Salmond defines Right (strict sense) as the correlative of Duty. In a wider sense, Right includes "any legally recognized interest." "In this generic sense a legal right may be defined as any advantage or benefit which is in any manner conferred upon a person by a rule of law." Rights are of three kinds, as follows:

1. Rights (strict sense) correlative to duties
2. Liberties, or the absence of legal duties
3. Powers, the ability to determine legal relations of others

Salmond next deals with the correlatives. "A duty is the absence of liberty; a disability is the absence of power; a liability is the presence either of liberty or power in some one else as against the person liable."

These compact sentences have troubled teachers of jurisprudence for more than thirty years. To illustrate: How can the Liberty of one be the Liability of another? Salmond puts as an

example of Liability correlative to Liberty "the liability of a trespasser to be forcibly ejected."<sup>65</sup> But is not the liability of the trespasser here correlative to the power of the landowner? Does not this power fall within the definition of power already given?

In the historical order, Salmond is the first writer who attempted to find not only the kinds of rights but also their correlatives.

Eleven years after the publication of Salmond's book, Wesley Newcomb Hohfeld (1879-1918) published a notable essay under the title *Fundamental Legal Conceptions as Applied in Judicial Reasoning*.<sup>66</sup> This essay attracted wide attention and immediately received the approval of such well-known and able experts as Professor Walter Wheeler Cook and Professor Arthur L. Corbin. Hohfeld attempted what had often in recent decades been attempted by others in Europe or in America—to isolate the basic types of legal relationship and to give each side of each relation a name suitable in itself and agreeable, so far as possible, to the usages of professional parlance. Hohfeld's solution quickly gained wide adhesion in all quarters, especially among law teachers,<sup>67</sup> judges, and even economists.<sup>68</sup> No law-review article had ever achieved more complete or quicker success.<sup>69</sup> This was all the more remarkable since jurisprudence still "stinks in the nostrils" not merely of the practising barrister, but even of teachers of law. Hohfeld died in his thirty-ninth year, too early to witness the most important developments of what he had constructed.

Any original, important, or revolutionary mode of thought, whether rightly or wrongly, inevitably meets opposition. After Hohfeld's death various attempts were made to subject the Hohfeld formulation to critical consideration, and in one or two instances the critical findings were unfavorable.<sup>70</sup> On the whole, however, the weight of opinion at the present time in America, and perhaps, also, in England,<sup>71</sup> accepts the Hohfeld formulation as logically correct and as practically useful.

Hohfeld's formulation of basic legal notions is interesting enough as a problem in practical logic and also important enough in itself to deserve a further word of elaboration. Hohfeld's formulation can best be understood by a preliminary inspection of the following four combinations:

1. Right (claim)—Duty
2. No right (no claim)—No Duty
3. Power—Liability
4. No Power—No Liability

There are two ways one person can work a constraint on another: (1) by having a legal position that requires the other to act; (2) by having a legal position that enables one to act against the other. These two forms are represented by 1 and 3 above. This was Hohfeld's starting point. His invention consisted in prefixing a No to each of the four terms (of 1 and 3) and in applying to each one of the negative terms a positive term.<sup>69</sup> The result is as follows:

1	2	3	4
Right	Privilege	Power	Immunity
Duty	No Right	Liability	Disability

The formulation last shown is said by Hohfeld to be one of jural correlatives. It is universally admitted that 1 and 3 are correlatives. But are 2 and 4 also correlatives? Can general negatives of positive correlations result in correlation unless the general negative is reducible to terms *positive in substance*?

Relational categories (correlations) can be stated in the form of either positive or negative propositions. Thus: (proposition) where there is a Right (claim) there must be a Duty in complete correspondence<sup>70</sup> with the Right (claim). But when we say that

where there is No Right there must be No Duty, have we created a new category?<sup>71</sup> It will, of course, be understood that in asking these questions, we are not denying the utility or necessity of general negatives such as No Right as a *method* of exhaustive classification, as shown by the celebrated tree of Porphyry, or as an instrument of pure exclusion.<sup>72</sup> We only raise the question whether general negatives can be the subject of categories jural or otherwise. When we say that a Right (claim) is in complete correlation with Duty, need we go on and add that where there is No Right there must be No Duty? If the need is felt, can we say that No Right and No Duty are perfect correlatives? Do they envisage the same subject matter?

A distinction must be made between *operation* and subject matter. Does not the use of the word "no" indicate an operation on a subject matter rather than subject matter itself? There is need, of course, for terminology both of operation and of subject matter, but can the two terminologies be combined?

Those and similar questions have sometimes been asked in some of the critical discussions of the Hohfeld system. A tendency has appeared to defend against the logical consequences of these questions by saying in effect that no matter what the logical defects of the system, if any, it yet serves a useful purpose in furnishing a basic terminology for legal reasoning. Even if the Hohfeld system is logically defective, it can little be doubted that it is more satisfactory than a system of thought based on the single idea of Right and Duty. The question still remains, however, if the system is logically unsound in its basic formulation, whether the illumination that comes from its use is not often factitious, and if it does not on occasion lead to disastrous technical results.<sup>73</sup>

One or two points of additional difficulty may be noticed. Hohfeld says that "immunity is the correlative of disability ('no-power'), and the opposite, or negation, of liability."<sup>74</sup> A judge

presiding at a trial is said to be *immune* from arrest.<sup>75</sup> Is it true that there is *no power* to arrest him? If so, how do such questions ever arise?<sup>76</sup>

Privilege is said to be the correlative of No Right.<sup>77</sup> Hohfeld said the "closest synonym of legal 'privilege' seems to be legal 'liberty.'"<sup>78</sup> If liberty is the meaning of privilege,<sup>79</sup> how can it be included in a table of legal relations? Law necessarily implies constraint,<sup>80</sup> and liberty is the negation of constraint.

If privilege means No Duty, then the result is two symmetrical general negatives: No Right and No Duty; No Power and No Liability. Assuming that the negatives are limited to a frame of reference consisting of four relations, the question intrudes: Do not the two negative relations absorb the two positive relations? Thus, does not No Right and No Duty include Power-Liability? And, does not No Power and No Liability include Right-Duty?

Professor Hohfeld died before his system was subjected to critical examination. When later various doubts<sup>81</sup> were presented touching the logical validity and practical utility of the system, some of Hohfeld's followers arose in quick and valiant defense. It must be said with regret that much of the defense is inconclusive and often unsatisfactory. Some of it attempts to open up controversy (probably unconsciously) about problems apparently long since settled. Most of the formal objections are entirely ignored. The defenders incline to ignore questions of logical form and strangely enough are unwilling to consider practical considerations in the use made of the terms immunity and privilege,<sup>82</sup> which runs counter to a long established professional tradition.<sup>83</sup>

#### TRENDS OF THE CENTURY

What summation can now be made of the vast field represented by the above enumerated writers?<sup>84</sup> What progress is shown or what trend has developed in this period of a century?<sup>85</sup>

The idea of law throughout the century was that its nature and essence for scientific purposes could be expressed in terms dealing with human beings, human groups, and political society. This led to the thought that sovereignty is a purely human power residing in an individual or group of individuals; that law is a human command expressing a human will; that so-called commercial transactions are concordances of actual minds (*aggregatio mentium*); that legal relations were material (social) bonds uniting material human beings. These views even in recent times went so far as to deny the idea of the State and the reality of sovereignty. This idea of law and its constituent operations was materialistic and anthropomorphic.

Toward the end of the Austin century, which may be said to start with the year 1832, a thin ray of light which subtly changed the appearance of legal reality fell upon this materialistic scene. Its literary and philosophical origin is still too obscure to warrant a discussion of its history. In Europe this view of legal reality is best known as *reine Rechtslehre*. This new view may be called the conceptual view of law. Its thesis is that all law and all its operations in a scientific sense are purely conceptual. To illustrate, positive law is not set or commanded by a sovereign person or a sovereign body of persons for the obedience of subject persons who are put under a duty of obedience under pain of a threatened evil, as Austin, in various forms, phrased this anthropomorphic idea, but rather, according to the conceptual view, the definition of law would be formulated by a reduction of all empirical legal elements<sup>86</sup> and phenomena to their ultimate logical (conceptual) elements.<sup>87</sup>

Another fact that may be stated is that the last quarter of the century emphasized the capital importance of jural relations as the central point of all formal jurisprudence.<sup>88</sup> The credit for this very important discovery for this country is due chiefly to Terry,



and after him to Professor Hohfeld, and hardly in lesser degree to the support and labors of Professors Walter Wheeler Cook, Arthur L. Corbin, and George W. Goble.<sup>89</sup> Whether or not what these scholars invented or supported can or will survive does not detract from the powerful impulse given by them to analysis of legal problems by a method that aims to be scientific.

#### ANALYTIC JURISPRUDENCE ELSEWHERE

Professor Holland, writing in 1880, said that "he soon discovered not only that the name of Austin was unknown in Germany, but that very little had been written in that country with a direct bearing upon analytical jurisprudence."<sup>90</sup> It is not difficult to imagine how scanty was the material when Austin, in the late 1820's, went to Germany to prepare himself for his lectures. Bentham's contributions alone stood out as of significant importance for analytic jurisprudence. When one examines the list of jurisprudence books that Austin "had chiefly valued and studied" and that later were bequeathed to the library of the Inner Temple,<sup>91</sup> one is better prepared to appreciate Austin's originality. As a list of juristic works from whatever angle, it must be rated as highly deficient even for its own day. For example, the *Rechtsencyklopädie* (juristic survey) is the oldest of the types of jurisprudence books, and yet Austin's collection included only that of Falck.<sup>92</sup> At that time there were already scores of such surveys.<sup>93</sup>

After a long history, the juristic survey as a distinct species of jurisprudential writing now seems to be moribund.<sup>94</sup> The juristic survey preceded by centuries the treatise on *Naturrecht*, and it continued to flourish a century after natural law was definitely on the decline.<sup>95</sup> The juristic survey was succeeded by the *allgemeine Rechtslehre*, the *juristische Prinzipienlehre*, the *Einführung in die Rechtswissenschaft*, the *juristische Grundlehre*, and other works bearing similar titles.<sup>96</sup> The jurisprudence literature of

Continental Europe has now grown to enormous proportions, but yet, while Austin's name and his views are now well known, this vast literature has not, strangely enough, produced a single work such as Holland's, Terry's, or Salmond's.<sup>97</sup>

This fact, however, is entirely without significance in point of substance and rests wholly on the accident of literary imitation. Austin laid out a rough outline of what a treatise on jurisprudence should contain; others in England, America, New Zealand, and elsewhere have followed. In Europe, no model for a jurisprudence treatise was ever created and jurisprudence researches do not typically appear, as with us, in a single form of literary monument. One not only must search the kinds of books above enumerated, but also must not overlook the fact that a large part of the jurisprudence writing in Europe, and especially in Germany, is to be found in the periodical literature. The *Pandektenlehrbuch*,<sup>98</sup> of course, in its *allgemeiner Teil*, is the one chief point of departure, but any work on theory of law in any of its aspects, including even *Rechtsphilosophie*, may turn out to be a treatise on jurisprudence.<sup>99</sup>

One of the chief contributions to analytic jurisprudence in the Austin century was the attempt to isolate and denominate the kinds of jural relationship. As we have seen, this contribution, through Terry, Hohfeld, and their successors, had an independent American origin. This scientific inquiry was also original, but it lacked priority. Hugo had discussed the *Rechtsverhältniss* as early as 1792.<sup>100</sup> In 1835 came Savigny, with a fuller discussion.<sup>101</sup> Later, many other writers discussed the idea of jural relationship. Among the rest were Binding,<sup>102</sup> Thon,<sup>103</sup> and Bierling.<sup>104</sup> Later, European interest in this aspect of analytic jurisprudence languished, and only in recent years has there been a renewal of this interest among Continental scholars.<sup>105</sup>

Although European production of books and articles on theory

of law regularly has been a hundredfold greater than our own, it is disappointing to discover that the problem of fundamental jural relations is still an open one. Only in recent years have European writers following American models attempted to state a terminology that embraces both the dominant and the servient side of jural relations in correlative form.<sup>106</sup> For purposes of such a terminology, the English language furnishes words of more compact meaning and of finer shades of distinction than any other. It is especially unfortunate that the German language, which from the beginning has been the leading jurisprudence idiom, finds itself unable to provide similar convenient terms for various juristic combinations.<sup>107</sup>

One of the most striking and significant developments in legal science was the rise of a *reine Rechtslehre*. This development is of such recency that the date of its most important formulation may be put down as recently as the year 1925. In that year, Hans Kelsen published his *Allgemeine Staatslehre*.<sup>108</sup> Kelsen became the head of the so-called, much discussed Vienna school. Its influence has already spread throughout Europe, and its ideas in recent months have been made available to readers of English.<sup>109</sup> Kelsen's system is dualistic, deriving from Kant. It deals with the antinomy of *Sein* and *Sollen* (reality and value) as inescapable.<sup>110</sup> The state is *Rechtsordnung* (legal organization).<sup>111</sup> The biological-psychological man and the juristic man are different entities.<sup>112</sup> These are some of the postulates of Kelsen's system. There is a legal order that is the starting point. It pervades all of social life and includes both primitive law, at one extreme, and international law at the other. As a system, it is entirely free of all empirical elements—whence the name *reine Rechtslehre*.

The details must here be passed over, but it is worth noting that Kelsen's system is only a variant of older related ideas made

familiar by such writers as Stammler<sup>113</sup> and Del Vecchio,<sup>114</sup> with the natural-law element obliterated.

Another point to be remarked is that there is not simply one *reine Rechtslehre*, but probably several different kinds<sup>115</sup>—all agreeing, however, in one fundamental feature: the conceptual purity of its subject matter. Another important version of *reine Rechtslehre* is that of Felix Kaufmann.<sup>116</sup> Kaufmann's views are analogical derivations of advances made in recent decades in mathematics and theoretical physics. The ultimate ideas of mathematics as shown by Weierstrass, Georg Cantor, Hilbert, Frege, and Russell are logical ideas.<sup>117</sup> The ultimate ideas of physics also reduce to mathematical, and, therefore, also logical form. Kaufmann found powerful support for his views in the ideas chiefly of Edmund Husserl.<sup>118</sup> Phenomenology, as defined by Husserl, is universal eidetic ontology. This new science is more a method than an ultimate or definite metaphysic. Its problems are those of gnosiology and not, it would seem, problems of ontology. What is of importance here is that this eidetic system deals not alone with questions of metaphysics, teleology, and ethics, but includes such practical fields of knowledge as psychology and law.

We have above briefly referred to an American point of view which regards law as conceptual in the whole of its existence and in its manifestations. The American view is not, like the European views, a deduction from a given philosophy or metaphysic, but is rather an induction arrived at from the practical impossibility of dealing with the fundamental elements of legal phenomena in any other way than from the standpoint of pure form.<sup>119</sup>

The conceptual view of legal reality seems at the moment to be dominant in Europe.<sup>120</sup> It is a movement that may be expected to grow. In the meantime, however, an internecine conflict may be expected, which for a long time will cast doubt on the validity of

the conceptual theory. Attainment of this level of development was sudden and unexpected, although it may now clearly be seen that it stems back to Plato, and already was under juristic construction by various philosophers and jurists even in the last century.<sup>122</sup> The level reached is a complete reversal of Holland's statement "that Jurisprudence is not a science of legal relations *a priori*, . . . but is abstracted *a posteriori*. . . ." <sup>123</sup>

#### ANTI JURISPRUDENCE

The Austin century witnessed the rise and development of analytic jurisprudence. All that had gone before, in comparison, was scanty in volume and of little practical or theoretical importance. The new century just beginning starts with an extensive literature and an awareness of the nature and kinds of problems to be treated. Analytic jurisprudence will not attain its proper mission until its findings are translated into legal codes and legal techniques. The present century might well realize these practical ends, but it seems probable that the next decades will be marked by intensive theoretical investigations without any immediate effect on the practical form of the law.

The development attained by analytic jurisprudence has been the result of a struggle of opposing ideas. The classic, many-sided struggle of the schools of jurisprudence is well remembered and vagrant echoes of this conflict still are heard. We have pointed out that the jural relation is the central theme of analytic jurisprudence. Within the present generation the controversies concerning State, Law, and Sovereignty have become less acrid, but in recent years, in various quarters of the world, as if under the impulsion of a *Weltgeist*, a heavy barrage has been laid down on the logical structure of law in the effort to destroy the idea of jural relationship.

Those who still believe in jural relations are found in divided

camp. There is the view that there is only one jural relation.<sup>123</sup> There is another view that there are only duties.<sup>124</sup> Next there is the view that there are two jural relations.<sup>125</sup> There follows a view that jural relations consist of three types.<sup>126</sup> That there are four jural relations is a view strongly represented in America.<sup>127</sup> There seems to be no five-type formulation, although it is entirely possible.

If we look upon jural relations as mental tools to arrive at practical results, the criterion of perfection is a system of such ideas which will account for all the differences in legal phenomena. All of the various formulations are operable, but not with equal facility or accuracy, having in mind the subject matter to be treated.

One of the ideas that enters into many formulations is that of Liberty. This seems to us a survival which serves no useful purpose. After a long struggle, the distinction got to be recognized between the social facts that create law and the political power that enforces it. It is universally admitted by experts in jurisprudence, even by those of extreme realistic and sociological bias, that coercion is an essential element in all legal rules, and it is, therefore, anomalous that the idea of Liberty, which is wholly free of any coercive meaning, is still regarded as a jural concept.

The first important attack on conceptualism was the publication by von Jhering of his *Scherz und Ernst in der Jurisprudenz*.<sup>128</sup> A few years later there arose the school of *freie Rechtsfindung* (*libre recherche*). An entirely new literature was created in the course of a few years.<sup>129</sup> This school combated the idea that legal systems are closed logical structures and emphasized the truth that in the most developed existing systems of law the element of discretion is one of major importance. In a word, the judge is not a mere automaton, but has a creative role in the application of law. The views represented by this literature are of various shades

—some orthodox, others conservative, but most of them daring and radical. It is not always easy to discover in a consideration of this literature any real issue, but one of the important ones is to state the sources of the judge's foundations of judgment. Is he limited to the strictly official sources, or may he go beyond them?

The so-called school of realism in America which, in varying degrees, is represented by some of our leading legal scholars,<sup>130</sup> seems to be the direct inheritor of the *freie Rechtsfindung* movement in Europe. The foundations, however, of American legal realism had already been laid in America independently of any European influence. These foundations were put down by James, Peirce, and Dewey, on the side of philosophy, and on the legal side chiefly by Justice Holmes<sup>131</sup> and later by Professor Bingham.<sup>132</sup> The realist movement is a contemporary phenomenon and its recency makes dispensable any attempt here to discuss it in detail.<sup>133</sup> This important literature may for the present be put aside with the statement that some of the extremer views of legal realism result in the annihilation of a true juristic science in this: that the formal apparatus of jural relationship either is not required or else is incompatible. The result reached regarding jural relations is an indirect but yet necessary one.

Among various European writers the same result is reached by direct attack on the idea of Rights. The best known of the writers of this generation who have opposed the idea of Rights is Duguit.<sup>134</sup> Duguit says "*la notion de service public vient remplacer celle de Souveraineté.*"<sup>135</sup> Auguste Comte had already said that the term *right* must be suppressed in a vocabulary of exact thought just as the term *cause* must be suppressed in the exact thought of philosophy. Duguit adopts these ideas in their entirety. Speaking of rights, he says, "it can truthfully be said that such a metaphysical conception cannot be maintained in an age of realism and positivism such as our own." "In other words, no one possesses

any right save that of always doing his duty." Duguit believes that the idea of rights cannot survive the present period. "A new system of law is evolving formed upon a purely realistic social conception—that of social function."

Duguit often frames his sentences as if he were discussing the *lex lata* and not the *lex ferenda*. If he means that rights are not real in the present age, he is clearly wrong, for his own country or any other of comparable economic life. Any jurist may be permitted to play the role of prophet, but it may be doubted whether even in a communistic society rights would disappear. Private law would tend to atrophy, but public law would in similar measure develop. Duguit's ideas, as he expresses them, are very destructive, but his unusual and wholly unscientific use of such terms as Liberty, Right, and Duty results in scientific self-elimination of his position so far as it touches analytic jurisprudence.

One of the latest and most vigorous writers to take up cudgels against jurisprudence is Anders Vilhelm Lundstedt, professor of civil law at the University of Uppsala. Two of his recent works<sup>136</sup> deal with *allgemeine Rechtslehre* and have attracted wide attention everywhere. He is one of the most extreme of the realists.<sup>137</sup>

It is somewhat surprising to find that Lundstedt opposes the reasoning of Duguit. He asserts that Duguit's position is based on an unverified natural-law assumption that ends in logical contradiction.<sup>138</sup> "As a science," says Lundstedt, "current jurisprudence is simply useless." His attack on current jurisprudence embraces practically all the great names that represent it—von Jhering, Windscheid, the Historical School, Bergbohm, Zitelmann, Austin, Jellinek, Kelsen, Gény, and all the rest. This necessarily follows, since Lundstedt denies the existence of the State, laws, and legal relations. He believes that nearly all legal theories and juristic constructions are false or else purely fictitious. It would be quite impossible to go further toward the goal of absolute nega-



tion. This characterization of Lundstedt's work indicates a fascinating program. Whatever one may think of it in the end, Lundstedt's books, and, especially his latest one,<sup>139</sup> are worthy of the closest attention. He has uttered a challenge to all of jurisprudence.<sup>140</sup>

Lundstedt has generously given credit for the philosophical foundations of his views to the philosopher and jurist Axel Hägerström (Uppsala).<sup>141</sup> It is not within the scope of this paper to attempt a critique of Lundstedt's views,<sup>142</sup> but a brief examination of his treatment of Austin's theory<sup>143</sup> may be intruded.

Lundstedt says that, according to Austin, duty arises out of a command. The command and the duty are conditions of a sanction, but, according to Austin, says Lundstedt, the existence of the duty rests on the sanction. Strangely enough, Lundstedt thinks that Austin's version of the origin of rights is a natural-law view. What a right is, he says further, can never be found from Austin's book. "Out of this series of empty phrases" (*Sinnlosigkeiten*) arise the following objections: (1) Laws are not the commands of the sovereign, since the sovereign does not know all of them; (2) that commands create duties which are conditioned by sanctions is circular reasoning; (3) the idea of rights is a pure fantasy and does not exist in reality.<sup>144</sup>

Lundstedt makes frequent use of the objection to circular reasoning. This objection, we believe, often involves only a matter of language and not a matter of substance. It does, however, probably draw attention to the need of correct language formulas. We have already shown that the jurisprudence view, from Austin up to the most recent times, was based on a physical and anthropomorphic view of legal reality. Lundstedt has made the most of this incorrect base of departure. One of the weakest points in the older system of thought was the capital emphasis based on psychological will. In the newer jurisprudential thought the will is

obliterated as an element of reasoning, so far as concerns the law, laws, consensual acts, or unilateral acts. This view would destroy the bulk of Lundstedt's criticisms. One wonders how Lundstedt would deal with the conceptual views of Kelsen, Kaufmann, and others. Lundstedt mentions Kelsen,<sup>145</sup> but dismisses him and his school with the statement that since he has cut himself off from the field of reality, there is nothing to consider.<sup>146</sup>

Lundstedt attacks a purely empirical system of jurisprudence by equally empirical methods. His points are shrewd and often well taken. He attempts to demolish empirical jurisprudence without giving us something to take its place. His idea of public welfare<sup>147</sup> must be implemented by a system of jural relations to be workable, but Lundstedt denies the existence of jural relations. The physical and mental do not exhaust the world of reality.<sup>148</sup> Another reality that legal sociologists refuse to consider is that of logical form.<sup>149</sup>

For the immediate present, the trend in jurisprudence, in tardy imitation of mathematics, is in the direction of developing an ultimate basis of juristic thought, not on empirical data alone, but on conceptual forms. Taken as a whole, the Austin century has presented developments of great interest and importance. The brilliance of its ending stands in marked contrast to the dismal aspects of its beginning. But Austin<sup>150</sup> is still regarded, and always will be considered, one of the founders of analytic jurisprudence.<sup>151</sup>

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#### NOTES

<sup>1</sup> See Kocourek, *The Nature of Interests and Their Classification* (1917) 23 AM. J. SOC. 359.

<sup>2</sup> Roman delictal law never passed beyond this view. European codes based on Roman law place tort obligations alongside contract obligations. See Surveyer, *A Comparison of Delictual Responsibility in Countries Governed by a Code* (1933) 8 TULANE L. REV. 53-82.

<sup>3</sup> This is especially true of the first three ultimate ideas, State, Sovereignty, and Law.

These ideas have engaged the attention not only of lawyers but also of political theorists, sociologists, and philosophers. Next, and in diminished importance, comes Personateness; see, for a review of the theories, WOLFF, JURISTISCHE PERSON UND STAATSPERSON (1933).

<sup>4</sup> Thus the later posthumous editions of AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED (1832), are entitled LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW. Austin himself identified General Jurisprudence with the Philosophy of Positive Law borrowing, as he admits, from Hugo, LECTURES (4th ed. by Campbell 1873) 32-33.

<sup>5</sup> See BEROLZHEIMER, THE WORLD'S LEGAL PHILOSOPHIES (1912) 1 ff. (trans. by Jastrow).

<sup>6</sup> Salmond's brilliant treatise ON JURISPRUDENCE OR THE THEORY OF LAW (1902) may be noticed as in part dealing with this feature.

<sup>7</sup> HOLLAND, THE ELEMENTS OF JURISPRUDENCE (1880), may be instanced as a valuable production pointing in this direction. A more complete and detailed development of Professor Holland's plan (in principle) would yield a priceless exposition of comparative law.

<sup>8</sup> Holland made this clear, *id.* (13th ed. 1924) at 1-13.

<sup>9</sup> See Sarah Austin's Preface to the 1861 reprint of AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, and the additional preface to AUSTIN, LECTURES ON JURISPRUDENCE (1863) and subsequent editions (5th ed. 1885; reprinted 1911).

<sup>10</sup> 1 *id.* (4th ed. 1873) at 98.

<sup>11</sup> Cf. SALMOND, *op. cit. supra* note 6.

<sup>12</sup> 1 AUSTIN, LECTURES, *op. cit. supra* note 9 (4th ed. 1873) at 94.

<sup>13</sup> *Ibid.*

<sup>14</sup> HARRISON, JURISPRUDENCE AND THE CONFLICT OF LAWS (1919).

<sup>15</sup> MAINE, EARLY HISTORY OF INSTITUTIONS (1875) 380.

<sup>16</sup> For an able and well-considered account of Austin's views, see the article by Professor E. Robertson (Lord Lochee) on *Law* in ENCYCLOPAEDIA BRITANNICA (9th ed. 1890) and reprinted in substance in the same collection (11th ed. 1910) 571-579.

<sup>17</sup> 1 AUSTIN, LECTURES, *op. cit. supra* note 9 (4th ed. 1873) at 226 (Lect. 6).

<sup>18</sup> Cf. *Kawanankoa v. Polyblank*, 205 U. S. 349, 27 Sup. Ct. 526 (1907). See the lively comment on the view expressed by Justice Holmes in this case by Zane, *A Legal Heresy* in CELEBRATION LEGAL ESSAYS (1919) 255 (in honor of Dean John H. Wigmore).

<sup>19</sup> This in part arises from the power of the states to amend the Constitution, and, from another direction, arises from the power exercised by the Supreme Court to nullify legislation. In *Norman v. B. & O. R. Co.*, 294 U. S. 240, 55 Sup. Ct. 407 (1930); *Nortz v. United States*, 294 U. S. 317, 55 Sup. Ct. 428 (1935); *Perry v. United States*, 294 U. S. 330, 55 Sup. Ct. 432 (1935) (the gold-clause cases), questions of sovereignty were involved and at least one of the points was raised in argument, but the Court avoided the issue. These points, in a word, are: Is not a constitution a limitation only on the government, or, in other terms, can a constitution, written or unwritten, limit the sovereign? The next question is: Can the sovereign be in legal relation to its subjects or to others? Cannot the sovereign at will refuse to keep its promises? Lastly: Can the court arm of the government properly override the legislative arm of the government when a question of sovereignty is involved?

<sup>20</sup> See Coker in 14 ENCYC. SOC. SCI. (1935) 265-269 (literature).

<sup>21</sup> Even Mr. Laski admits: "Nor is it possible in the sphere of positive law, to refute it."

*Jus est quod iustum est* is of the essence of the state." LASKI, *THE FOUNDATIONS OF SOVEREIGNTY* (1921) 17.

<sup>22</sup> The only reference to state is found in 1 AUSTIN, *LECTURES*, *op. cit. supra* note 9 (4th ed. 1873) at 249, n. 5 (lect. 6).

<sup>23</sup> 1 *id.* at 67.

<sup>24</sup> Von Jhering fell into a similar difficulty in supposing that there may be duties without, for the time being, any existing claim holders. See VON JHERING, *JAHR. F. DOGMATIK* X, 387-380.

<sup>25</sup> 1 AUSTIN, *LECTURES*, *op. cit. supra* note 9 (4th ed. 1873) at 57.

<sup>26</sup> Case of Sutton's Hospital, [1612] 10 Rep. 1.

<sup>27</sup> Chiefly by Professor Hans Kelsen and the so called Vienna School. See KELSEN, *ALLGEMEINE STAATSLEHRE* (1925); *REINE RECHTSLEHRE* (1934), trans. by Charles H. Wilson in (1934) 50 L. Q. REV. 474-498, (1935) 517-535. See Lauterpacht, *Kelsen's Pure Science of Law in Modern Theories of Law* (1933) 105-138.

<sup>28</sup> One of the consequences of the transition from the social to the conceptual level is that some of the terminology adapted to the social level of legal phenomena will need replacement by terms which represent the conceptual fact. For example, the term "command" especially is entirely faulty. The term "will" (in the sense of desire or wish) also must be rejected.

<sup>29</sup> ROSS, *THEORIE DER RECHTSQUELLEN* (1929) 83, 95-98, speaks of Austin's work as "*eine Grostat die einem Kant würdig gewesen wäre.*"

<sup>30</sup> (6th ed. 1905).

<sup>31</sup> MARKBY, *ELEMENTS OF LAW CONSIDERED WITH REFERENCE TO THE GENERAL PRINCIPLES OF JURISPRUDENCE* (6th ed.) 1-24.

<sup>32</sup> See 1 AUSTIN, *LECTURES*, *op. cit. supra* note 9 (4th ed. 1873) at 34, for an enumeration of the most important notions encountered in "general jurisprudence," and *id.* at 353 *ad fin.* (Lects. 12-27) for his Analysis of Pervading Notions.

<sup>33</sup> This work (3d ed. 1877) is well known in America, due to the fact that, unlike the earlier work, it was "designed for the instruction of all serious students, whether of the Physical or the so-called Moral Sciences," and not for law students alone. It was republished in America as Vol. 10 of the INT. SCI. SER. (1894) and a generation ago was in considerable use in American colleges of liberal arts.

<sup>34</sup> AMOS, *SCIENCE OF LAW* (3d ed. 1877) 4.

<sup>35</sup> *Id.* at 324.

<sup>36</sup> Out of an already extensive literature, see, for one of the latest and most closely reasoned views that there is an international law, KELSEN, *THE LEGAL PROCESS AND INTERNATIONAL ORDER* (1935) (New Commonwealth Institute Monographs).

<sup>37</sup> Amos seems to have arrived at the necessary distinction between state and government: AMOS, *op. cit. supra* note 34, at 118-120. At another place, Amos takes the correct position that "the state cannot be regarded as conceding rights to itself." *Id.* at 99.

<sup>38</sup> First American edition (1896) from the seventh English edition (1895). The latest English edition is the thirteenth (1924).

<sup>39</sup> See HOLLAND, *op. cit. supra* note 7 (13th ed. 1924) at 168, for his classification. It may be suggested that this is a juristic classification which probably would be inadequate for a practical or professional arrangement of the law. Nearly all English language books on jurisprudence have been written either (1) on the basis of a juristic classification

(e.g., Holland); (2) with a classification clearly in view (e.g., Austin); (3) for the purpose of developing a classification (e.g., Terry). We believe that the present age very much needs a comparative law text based on a scientific classification, carried out in detail for the leading countries, for which Holland's book furnishes the proof of its value and useful suggestions of the method of comparison. Such a work probably would require the collaboration of many experts and could hardly be envisaged except as a series of ample volumes. Something of the sort has already been published for commercial law: BORCHARDT *et al.*, *DIE GELTENDEN HANDELSGESETZE DES ERDBALLS* (1906-1908) 14 volumes; French edition, 16 volumes published (out of 37); American and British edition (*The Commercial Laws of the World*) 23 volumes published (out of 32).

<sup>40</sup> Published by T. & J. W. Johnson & Co., Philadelphia. This book long since has been out of print.

<sup>41</sup> TERRY, *SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* (1884) 1.

<sup>42</sup> *Id.* at preface, v. Terry did not anticipate the ingenuity of law publishers with their key numbers, descriptive word indexes, and citators. Today it may be said, in general, that except for the defects of existing classification schemes and defects in distribution systems, no task is easier than to find relevant cases. The great difficulty now is to master the vast materials that are found.

<sup>43</sup> *Id.* at vii.

<sup>44</sup> Tokyo, 1878.

<sup>45</sup> Tokyo, 1898; 2d ed. rev., Tokyo, 1906. This large work is a modernized Blackstone, intended for instruction of Japanese law students. It could be used as an institutional treatise on English law in any country.

<sup>46</sup> On his second and final return to America, he again took up his residence in New York City. If he was known through his leading work on jurisprudence, he now became better known through various articles contributed to leading American law reviews.

<sup>47</sup> 11 *WHO'S WHO IN AMERICA* (1920-1921) is the last volume which contains a biographical statement of Terry.

<sup>48</sup> Austin's early career as a soldier gave rise to the poetic thought that his military experience was the basis of his imperative theory of law. Nothing of that sort accounts for the brontosaurian absolutism of the tutor and pensioner in HOBBS, *LEVIATHAN* (1651).

<sup>49</sup> TERRY, *op. cit. supra* note 41, at Preface, vi.

<sup>50</sup> Much later the same method was adopted extensively in the use of Professor Hohfeld's terminology. See ANSON, *CONTRACTS* (3d. Amer. ed. by Corbin, 1919), and in general (1916) 26 *YALE L. J.*, and vols. *ff.*

<sup>51</sup> As early as 1887, Holland had become acquainted with Terry's book. Holland mentions it in the preface to the fourth edition of his *JURISPRUDENCE*, but does not profit from Terry's discovery. It may be stated with confidence that no treatise can be a genuine work on analytic jurisprudence operating only with the idea of right (claim)—duty.

<sup>52</sup> TERRY, *op. cit. supra* note 41, at Preface, ix.

<sup>53</sup> *Id.* at 87-101.

<sup>54</sup> *Id.*, § 116, 90.

<sup>55</sup> This is the view of Sir John Salmond [*op. cit. supra* note 6 (3d ed. 1910) at 197, n. 2].

<sup>56</sup> Eighth edition, 1930.

<sup>57</sup> Seventh edition, 1928.

<sup>58</sup> See, for example, his profound and clear analysis of sovereignty, SALMOND, *op. cit.* *supra* note 6 (3d ed. 1910), Appendix II, 473, 84. It may also be here noted that Salmond long preceded the Vienna School in the statement of two of its important positions. The first is that of ultimate legal principles (*id.* at 125-126) and that "no constitution can have its source and basis in the law" (*id.* at 105-110). Salmond in his statement that agreements are forms of law anticipated the *Stufenbau* theory made prominent by the Vienna School (*id.* at 31, 53, 54, 124).

<sup>59</sup> *Id.* at 9.

<sup>60</sup> This definition, in substance, was adopted by GRAY, *THE NATURE AND SOURCES OF LAW* (1909, 2d ed. 1921) 84.

<sup>61</sup> SALMOND, *op. cit. supra* note 6 (3d ed. 1910) at 193-198.

<sup>62</sup> *Id.* at 197.

<sup>63</sup> (1913) 23 YALE L. J., 16 ff. Professor Hohfeld's writings, with an introduction by Professor Walter Wheeler Cook, have been collected and published in a single volume, under the same title (1923).

<sup>64</sup> See ANSON, *loc. cit. supra* note 50.

<sup>65</sup> See COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924). (See note 69 *infra*.)

<sup>66</sup> See YALE L. J. beginning with Vol. 26 (1916).

<sup>67</sup> See (Frederick) Green, *The Relativity of Legal Relations* (1923) 5 ILL. L. Q. 187; Husik, *Hohfeld's Jurisprudence* (1924) 72 U. OF PA. L. REV., 266; Dainow, *The Science of Law* (1934) 12 CANADIAN BAR REV. 265.

<sup>68</sup> See Randall, *Hohfeld on Jurisprudence* (1925) 40 L. Q. REV. 86.

<sup>69</sup> With one exception, No Right. For the needs of economic reasoning, Professor Commons (see note 65 *supra*) substitutes for Privilege—No Right, the correlation, Liberty—Exposure: Commons, *Economics and Social Philosophy* (1935) 1 J. Soc. PHIL. 12.

<sup>70</sup> There are cases of imperfect correspondence. Father-Son is an imperfect correlation (there may be a father without a son); so, also, is Mother-Son or Mother-Daughter. Parent-Child is a perfect correlation. But what idea is suggested, if any, by the fictitious or merely verbal correlation, No Parent-No Child?

<sup>71</sup> It may be noticed that the chemist operates with 92 elements in a scale from hydrogen to uranium. He does not add a No to each element and attempt to give it a distinct name apart from the others.

<sup>72</sup> See DEMOS, A DISCUSSION OF CERTAIN TYPES OF NEGATIVE PROPOSITIONS (1917) *Mind* 188. Negative propositions may exist but not negative categories; nor can there be negative (in substance or entity) relations.

<sup>73</sup> Another form of defense is: Does it work? Perhaps the form of the question should be: How well does it work having regard to all the phenomena of law? It may be recalled that before the days of Windscheid, Thon, Bierling, Terry, Salmond, and Hohfeld, the single relation of Right-Duty also worked, but how well for the purpose of accurate legal analysis?

<sup>74</sup> HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) 60.

<sup>75</sup> Blackstone says: "Peers of the realm, members of parliament, and corporations are privileged from arrests": COMM. iii, 288. Terry says that members of parliament have "the right of exemption from arrest": COMMON LAW (2d ed. 1906) 46.

<sup>76</sup> It may be noted that immunity, as explained by Hohfeld's chief commentators,

Professor Cook, HOFELD, *op. cit. supra* note 74 (Preface, 8), and Professor Corbin [Corbin, *Legal Analysis* (1919) 29 YALE L. J. 165], means *absolute* immunity. The dilemma raised is that if the immunity is absolute there is nothing of jural significance involved; but if the immunity is not absolute there is no lack of power. This use of the term immunity seems to us extraordinary. We have searched in vain for any dictionary verification. The Century Dictionary (s. v. Immunity) defines it as an exemption from something; thus "exemption from any natural or usual liability." This is illustrated in the lines from Cowper (EXPOSTULATION: l. 82):

"A man is frail and can but ill sustain  
A long immunity from grief and pain."

The point here is that if there were no grief and pain there would be no immunity from grief and pain.

<sup>77</sup> HOFELD, *op. cit. supra* note 74, at 39.

<sup>78</sup> *Id.* at 47. The followers of Hohfeld have not, we believe, agreed on the exact meaning of the term, privilege. Some of them believe it means No-Duty (*id.* at 7, Int. by Professor Cook); others think it means No-Duty-Not-to [Clark, *Relations, Legal and Otherwise* (1922) 5 ILL. L. Q. 29].

<sup>79</sup> The term, privilege, in any event, seems to be a compound term not yet reduced to its ultimate elements. Thus, it would not recognize any distinction between the right of A to pass over B's land and the right (?) of B to stay off his own land. Furthermore, all duties would be accompanied by privileges. Thus, if A makes a tender of performance to B, A also has a privilege to make the tender. See Goble, *Negative Legal Relations* (1922) 5 ILL. L. Q. 36 (48).

This use of privilege finds no dictionary support. The term was used in Roman law to indicate *constitutiones personales*. Thibaut says, the term *privilegium* is "often confined by modern jurists to laws by which a person is excepted from the common rule." See LINDLEY, *STUDY OF JURISPRUDENCE* (1890) 27 (translation of the General Part of THIBAUT, *SYSTEM DES PANDEKTEN*).

<sup>80</sup> See PEARSON, *GRAMMAR OF SCIENCE* (1892) caps. iii, iv.

<sup>81</sup> If the terms *immunity* and *privilege* had been recognized as reciprocals, respectively of right (claim) and of power, the Hohfeld system would have been complete, consistent, and in accord with the lawyer's terminology. The practical significance of these reciprocal forms is very great. They are exceptional varieties of the forms with which they reciprocate and procedurally they must be alleged and proved. In the Hohfeld system this important distinction is entirely ignored. Thus, Professor Cook says of privileged defamation that "there is an *absence of duty* on the part of the one publishing the defamatory matter." HOFELD, *op. cit. supra* note 74, Int. 7. Is not this entirely too facile? Must not the defendant allege and prove his privilege?

<sup>82</sup> On the question of reciprocation of Claim and Immunity and of Power and Privilege, see an opposing view by the Hungarian jurist, HORVÁTH, *RECHTSZOZIOLOGIE* (Berlin, 1934) 233-235. See, also, by the same author, *Sociologie Juridique* [EXTRAIT DES ARCHIVES DE PHILOSOPHIE DU DROIT (1935)] 221-223.

<sup>83</sup> There has been some variation in the usage of these terms; sometimes they have been confused; but the idea underlying them has from the beginning been recognized, if not understood.

<sup>84</sup> Among other works are the following: REDDIE, *INQUIRIES ELEMENTARY AND HISTORICAL IN THE SCIENCE OF LAW* (1840); PHILLIPPS, *JURISPRUDENCE* (London,

1863); LORIMER, *THE INSTITUTES OF LAW* (1872); HERON, *THE PRINCIPLES OF JURISPRUDENCE* (1873); RATTIGAN, *THE SCIENCE OF JURISPRUDENCE* (3d ed. 1909); POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* (1882); CLARK, *PRACTICAL JURISPRUDENCE: A COMMENT ON AUSTIN* (1883); HEARN, *THE THEORY OF LEGAL DUTIES AND RIGHTS* (1883); LIGHTWOOD, *THE NATURE OF POSITIVE LAW* (1883); MILLER, *LECTURES ON THE PHILOSOPHY OF LAW* (1884); DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* (1894); POLLOCK, *FIRST BOOK OF JURISPRUDENCE* (1896); GOADBY, *INTRODUCTION TO THE STUDY OF LAW* (2d ed. 1914); BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* (1901); HERKLESS, *LECTURES ON JURISPRUDENCE* (1901); MILLER, *THE DATA OF JURISPRUDENCE* (1903); BROWN, *THE AUSTINIAN THEORY OF LAW* (1906); TAYLOR, *THE SCIENCE OF JURISPRUDENCE* (1908); GRAY, *op. cit. supra* note 60; LE BUFFE, *OUTLINES OF PURE JURISPRUDENCE* (1924).

<sup>85</sup> Not everything of importance for analytic jurisprudence is represented by books alone. There are scores of valuable law-review articles which must also be taken into account.

<sup>86</sup> One of the difficulties of such a definition is that it cannot, like a new system of mathematics, invent new symbols. It is impeded by a language medium wholly unsuited for accurate statement and analysis. It may, however, be pointed out that the logically essential elements of Austin's definition will be retained, and it may be suggested that if Austin had hit on the conceptual approach to his subject matter (much too early, of course, for the psychology, logic, and philosophy of his day), his theory would have escaped all the criticism that it has encountered and still encounters, due to its anthropomorphic structure.

<sup>87</sup> A distinction, we believe, needs to be made between the factors which enter into the composition of law and the composition itself. This distinction is precisely the same as that in chemistry. Hydrogen (a gas) and oxygen (another gas), when combined, produce an entirely new substance, water (a liquid). On this view, law is something other than a mere collection of rules. There are several famous definitions which in part phrase the idea suggested. Kant speaks of "the sum of the circumstances," etc. (*RECHTSLEHRE*, 27); Savigny points to "invisible boundaries" (*SYSTEM*, i, § 52); Krause, more correctly, defines law as "the organic whole of the external conditions of life," but qualifies incorrectly when he adds, "measured by reason" (*ABRISS*, 209). These and other definitions are collected in POUND, *OUTLINES OF JURISPRUDENCE* (4th ed. 1928) 37-47.

<sup>88</sup> A collateral development is the invention of symbols to indicate the kinds and interplay of jural relations. Professor Thompson G. Marsh, in a doctoral thesis (Yale Law School, 1935), entitled *Jural Pasiography*, has shown by a detailed analysis of numerous reported cases in diverse fields of law the practical applicability and utility of symbolic analysis. We believe Professor Marsh's pioneer work is of first-rate importance.

<sup>89</sup> In a recent article, *A Redefinition of Basic Legal Terms* (1935) 35 *COL. L. REV.* 535 ff., Professor Goble makes a reformulation of the Hohfeldian terminology. "The basic legal concept," says Professor Goble, "is power" (*id.* at 535). This statement is, we believe, sound, and it finds much support, but, of course, the term, Power, as a generic term, must be kept apart from the specific meaning. We believe, however, it would be inconvenient to substitute Power for Right as a generic term. See THIBAUT, *SYSTEM DES PANDEKTENRECHTS* (Madrass, 1840) 52 (trans. by Lindley): "A right is neither more nor less than a legal power to compel . . ." See, also, WINDSCHEID, *LEHRBUCH DES PANDEKTENRECHTS* § 37; MERKEL, *JURISTISCHE ENCYKLOPÄDIE* (3d ed. 1904) § 159.



<sup>90</sup> HOLLAND, *op. cit. supra* note 7, at Preface. Cf. BERGBORM, JURISPRUDENZ UND RECHTSPHILOSOPHIE (1892) 13 ff.; SOMLÓ, JURISTISCHE GRUNDLEHRE (2d ed. 1927) 33 ff.

<sup>91</sup> AUSTIN, LECTURES, *op. cit. supra* note 9 (4th ed. 1873) at ix.

<sup>92</sup> 1925, 5th ed. by von Jhering, 1851.

<sup>93</sup> KORKUNOV says the first book bearing the name encyclopedia was that of Hunnius (1638). It is said that DURANTIS, SPECULUM JUDICIALE (1275), was the first encyclopedic treatise. See KORKUNOV, THEORY OF LAW (Hastings' trans. 1909) 10 ff. See, also, FALCK, JURISTISCHE ENCYCLOPÄDIE (5th ed. 1851) 37; PÜTTER, JURISTISCHE ENCYCLOPÄDIE UND METHODOLOGIE (1767) 2-6; ANNE DEN TEX, ENCYCLOPÆDIA JURISPRUDENTIÆ (1839) 6-19. (The last writer says: "*Nomen encyclopediæ primus usurpavit Piltternus*," *id.* at 16.)

<sup>94</sup> The leading modern text which still survives is GAREIS, RECHTSENCYCLOPÄDIE UND METHODOLOGIE (1887) [5th ed. by Wenger (1920)]. The third edition (1905) of this work appeared in English translation (1911) and was incorporated in the MODERN LEGAL PHILOSOPHY SERIES.

<sup>95</sup> See FALCK, *op. cit. supra* note 93, at 78 ff.

<sup>96</sup> See SOMLÓ, *op. cit. supra* note 90, at 5-15.

<sup>97</sup> See cf. PICARD, LE DROIT PUR (1920); ROGUIN, LA RÈGLE DE DROIT (1889); ROGUIN, LA SCIENCE JURIDIQUE PURE (1923) (3 vols.); CAPITANT, INTRODUCTION À L'ÉTUDE DU DROIT CIVIL (4th ed. 1923); BONNECASE, INTRODUCTION À L'ÉTUDE DU DROIT (2d ed. 1931).

<sup>98</sup> See WINDSCHIED, *op. cit. supra* note 89 (9th ed. by Kipp, 1906); BEKKER, SYSTEM DES HEUTIGEN PANDEKTENRECHTS (1886); ENNECCERUS, LEHRBUCH DES BÜRGERLICHEN RECHTS (8th ed. 1921).

<sup>99</sup> There are various European journals which often contain articles of considerable importance for analytic jurisprudence. Among them are ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE (1907-); ZEITSCHRIFT FÜR RECHTSPHILOSOPHIE 1914-1929); RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO (1921-); REVUE INTERNATIONALE DU DROIT (1926-); ARCHIVES DE PHILOSOPHIE DU DROIT (1931-).

<sup>100</sup> LEHRBUCH DER JURISTISCHEN ENCYCLOPÄDIE (8th ed. 1835).

<sup>101</sup> SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1840-49), § 52 (8 vols.) (trans. by Holloway, 271).

<sup>102</sup> DIE NORMEN UND IHRE ÜBERTRETUNG (1872-77).

<sup>103</sup> RECHTSNORM UND SUBJECTIVES RECHT (1878).

<sup>104</sup> KRITIK DER JURISTISCHEN GRUNDBEGRIFFE (1877-83); JURISTISCHE PRINCIPALIEN-LEHRE (1894-1911).

<sup>105</sup> E.g., ROGUIN, LA SCIENCE JURIDIQUE PURE (1923); SOMLÓ, *op. cit. supra* note 90 (1917, 2d ed. 1927); HORVÁTH, RECHTSZOLOGIE (1934).

<sup>106</sup> Cf. *id.* at 233-4, n.

<sup>107</sup> *Ibid.*

<sup>108</sup> This work followed Kelsen's foundation treatise, HAUPTPROBLEME DER STAATSLERE (1911).

<sup>109</sup> REINE RECHTSLEHRE (1934), trans. by Charles H. Wilson in (1934) 50 L. Q. REV. 474-498, (1935) 51 *id.* at 517-535.

<sup>110</sup> ALLGEMEINE STAATSLERE (1925) 19.

<sup>111</sup> *Id.* at 18.

- <sup>112</sup> *Id.* at 7.
- <sup>113</sup> Cf. STAMMLER, *LEHRBUCH DER RECHTSPHILOSOPHIE* (3 Aufl. 1928) and *THEORIE DER RECHTSWISSENSCHAFT* (1911).
- <sup>114</sup> Cf. DEL VECCHIO, *IL CONCRETO DEL DIRITTO* (2d ed. 1912).
- <sup>115</sup> Cf. ROGUIN, *LA SCIENCE JURIDIQUE PURE*. ROGUIN'S *RÈGLE DE DROIT* bore the subtitle, *ÉTUDE DE SCIENCE JURIDIQUE PURE* (1889).
- <sup>116</sup> KAUFMANN, *LOGIK UND RECHTSWISSENSCHAFT* (1922); *DIE KRITERIEN DES RECHTS* (1924).
- <sup>117</sup> RUSSELL, *SKEPTICAL ESSAYS* 71.
- <sup>118</sup> HUSSERL *IDEEEN ZU EINER REINEN PHÄNOMENOLOGIE UND PHÄNOMENOLOGISCHEN PHILOSOPHIE* (1913). See, also, SCHULER, *DER FORMALISMUS IN DER ETHIK UND DIE MATERIALE WERTETHIK* (1913); HUSSERL, *FORMALE UND TRANSCENDENTALE LOGIK* (1929).
- <sup>119</sup> For example, the difficulty of dealing with the individual as a fixed and static entity. See JORDAN, *FORMS OF INDIVIDUALITY* (1927) 87-132.
- <sup>120</sup> See VAS, *DIE BEDEUTUNG DER TRANSCENDENTALEN LOGIK IN DER RECHTSPHILOSOPHIE* (Szeged, 1935), discussing the neo-Kantian schools of Marburg (Cohen and Natorp) and of Baden (Rickert and Lask); BOBBIO, *L'INDIRIZZO FENOMENOLOGICO NELLA FILOSOFIA SOCIALE E JURIDICA* (Torino, 1934)—an examination of the views of Husserl, Scheler, Stein, Felix Kaufmann, Reinach, and Kelsen.
- <sup>121</sup> For a complete review of the theory of jural personateness, one of the foundations of the conceptual theory in all the varieties of *reine Rechtslehre*, see WOLFF, *op. cit. supra* note 3, esp. at 71 ff.
- <sup>122</sup> HOLLAND, *op. cit. supra* note 7 (13th ed. 1924) at 9.
- <sup>123</sup> See PUNTSCHART, *MODERNE THEORIE DES PRIVATRECHTS* (1893) and *FUNDAMENTALEN RECHTSVERHÄLTNISSE* (1885).
- <sup>124</sup> See DUGUIT, *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ* (2d ed. 1920).
- <sup>125</sup> See I WINDSCHEID, *op. cit. supra* note 89 (9th ed. by Kipp, 1906) at 155. Windscheid includes the nonjural idea of Liberty under the concept Power.
- <sup>126</sup> See POUND, *READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW* (2d ed. 1913) 413, and *INTRODUCTION TO THE STUDY OF LAW* (1912) § 6. See, also, BIERLING (*ANSPRUCH, DÜRFEN, KÖNNEN*), *KRITIK DER JURISTISCHEN GRUNDBEGRIFFE* (1877-1883) and *JURISTISCHE PRINZIPIENLEHRE* (1894-1911). See, also, THON, *RECHTSNORM UND SUBJektIVES RECHT* (1878); SALMOND, *op. cit. supra* note 6 (3d ed. 1910) at 193-197.
- <sup>127</sup> HOFELD, *op. cit. supra* note 74, at 36.
- <sup>128</sup> Leipzig, 1885, 10th ed. 1909.
- <sup>129</sup> For examples of this literature, see the translations published in *SCIENCE OF LEGAL METHOD* (9 MODERN LEGAL PHILOSOPHY SER. 1917), including writings of Gény, Kiss, Berolzheimer, Kohler, Gerland, Lambert, and Wuzel.
- <sup>130</sup> Among the rest, Judge Hutcheson, Professor Llewellyn, Professor Moore, Professor Oliphant, Professor Radin, Professor Yntema, Dean Leon Green, Jerome Frank.
- <sup>131</sup> Holmes said: "A legal duty so called is nothing but a prediction." *The Path of the Law* (1897) in *COLLECTED LEGAL PAPERS* (1920) 169.
- <sup>132</sup> Bingham, *What is the Law?* (1912) 11 MICH. L. REV. 1, 109.
- <sup>133</sup> See Goodhart, *Some American Interpretations of Law*, in *MODERN THEORIES OF LAW* (1933) 1-20; DICKINSON, *LEGAL RULES* (1931); Kocourek, *Libre recherche en*

*Amérique* in 2 REUEIL D'ÉTUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY (1935) 459-502.

<sup>134</sup> Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* (1912), translated in *PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY* (11 *Cont. Legal Hist. Ser.* 1918) 65-143.

<sup>135</sup> DUGUIT, *LES TRANSFORMATIONS DU DROIT PUBLIC* (1913) xix.

<sup>136</sup> SUPERSTITION OR RATIONALITY IN ACTION FOR PEACE (1925) *esp.* 129-158; 1 *DIE UNWISSENSCHAFTLICHKEIT DER RECHTSWISSENSCHAFT* (1932).

<sup>137</sup> A reviewer has said of him: "Darum ist Lundstedt auch einer der grössten Umwälzer unserer Zeit und etwa einem Einstein gleich zu setzen."

<sup>138</sup> LUNDSTEDT, *SUPERSTITION*, *op. cit. supra* note 136, at 147.

<sup>139</sup> 1 LUNDSTEDT, *DIE UNWISSENSCHAFTLICHKEIT*, *loc. cit. supra* note 136.

<sup>140</sup> Cf. KRAFT, *DIE UNMÖGLICHKEIT DER GEISTESWISSENSCHAFT* (Leipzig, 1934).

<sup>141</sup> For a bibliography of Høgerström's writings, see LUNDSTEDT, *SUPERSTITION*, *op. cit. supra* note 136, Preface, at 7. See, also, ROSS, *KRITIK DER SOGENANNTEN PRAKTISCHEN ERKENNTNIS (KRITIK DER RECHTSWISSENSCHAFT)* (Copenhagen, 1933) 186.

<sup>142</sup> For an examination of Lundstedt's views, see FUCHS, *DIE ZUKUNFT DER RECHTSWISSENSCHAFT* (Stuttgart, 1933).

<sup>143</sup> LUNDSTEDT, *DIE UNWISSENSCHAFTLICHKEIT*, *op. cit. supra* note 136, at 191-198.

<sup>144</sup> For the detail, see *id.* at 79-118.

<sup>145</sup> *Id.* at 210-213.

<sup>146</sup> For an earlier work which raises questions concerning the existence and nature of rights, see SCHLOSSMANN, *DER VERTRAG* (1876) 243 ff.

<sup>147</sup> LUNDSTEDT, *SUPERSTITION*, *op. cit. supra* note 136, at 129 ff.

<sup>148</sup> See RUSSELL, *OUR KNOWLEDGE OF THE EXTERNAL WORLD* (1914, 2d ed. 1926) 205.

<sup>149</sup> Cf. HORVATH, *RECHTSOZIOLOGIE*, *op. cit. supra* note 82, at 42-76.

<sup>150</sup> But cf. MANNING, *Austin Today*, in *MODERN THEORIES OF LAW* (1933) 180-226. It is not improbable that Bentham must be put down as the originator of analytic jurisprudence. Bentham died in the year 1832, the same year that AUSTIN, *PROVINCE*, was published. BENTHAM, *WORKS* (incomplete) (Bowring's ed., 11 vols.), were not published until the year 1843. It would be desirable that a complete collection of Bentham's writings on analytic jurisprudence be made. This step is necessary before an accurate judgment can be made of the value of the respective contributions of Bentham and Austin.

<sup>151</sup> Since the above article was put in type, there has appeared a learned and valuable review of the same topic: Pound, *Fifty Years of Jurisprudence* (1937) 50 *HARV. L. REV.* 557-582 (to be continued).

## THE FUNCTION OF THE PURE THEORY OF LAW<sup>1</sup>

HANS Kelsen

THE law (*droit*) can be made the object of cognition in very different ways. A particular juridical order may be developed systematically, *e.g.*, the law of France or international law; or a certain group of norms of a particular juridical order may be studied, *e.g.*, the criminal law of Sweden or the German law of contracts; or a particular rule of law may be analyzed, *e.g.*, the regulation of interest as damages according to the civil code of Switzerland. In all these cases we have to do with *dogmatic* jurisprudence. The intention may also be to clarify these norms or groups of norms to make their meaning more precise than can be seen immediately from the authentic formulation which the norm has received by coming into existence as a statute, an ordinance, a treaty. In this case the author gives at the same time an interpretation of the norm. But it is also possible to ask how the contents of a particular juridical order or of certain of its institutions historically originated (*history* of law). It is further possible to compare these contents with those of other juridical orders, to look for conformity or diversity, in order to arrive at certain juridical types (*comparative* law). Finally, it is possible to study, on the basis of a comparison of all phenomena, described as "law," the essence of the law, its typical structure, independently of the varying contents which the law has at different times and at different places. This is the task of a *general* jurisprudence, *i.e.*, a jurisprudence that does not restrict itself to a particular juridical order or to particular rules. The task here is to determine the basic conceptions that enable us to master any law.

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General jurisprudence, therefore, constitutes the theoretical basis for all other branches of jurisprudence.

The pure theory of law is neither the dogmatic nor the interpretative development of a particular juridical order, neither history of law nor comparative law, but general jurisprudence.

The cognition of law is always exposed to a double danger inherent in the very nature of its object. However one may define the essence of law, it cannot be denied that it constitutes a regulation of human behavior. But it constitutes by no means the only possible regulation of this behavior. We consider the factual behavior of men, too, as being regulated by laws of nature, *i.e.*, on the basis of the causal *nexus*, as being insolubly connected with all the other events that are determined in the same way. The factual behavior of men—corresponding always and without exception to the natural order of things (in the sense of natural sciences)—may correspond to the juridical order, but that is by no means necessarily so. Whereas the behavior of men can never be in contradiction to the order determined by the causal *nexus*, it may very well be illegal. As the legal behavior of men is always also determined by the causal *nexus*, legal cognition is threatened by the danger of comprehending the natural instead of the legal and normative order, *i.e.*, of asking not how men *ought* to behave according to the law, even if perhaps they do not behave so in fact, but how they do behave *in fact*, and why; *i.e.*, for what reasons they do behave in this way. The danger of confusion between natural and normative order is further aggravated by the following circumstance: The fact itself that there is a normative order, that men have the conception of this order, that men perhaps even consciously create such a normative order, that they create rules regulating human behavior, the fact that human behavior does correspond to legal rules is in itself determined by the causal *nexus*. And more:

A normative order is considered as obligatory for men, as "valid" and, therefore, as "order" only under the condition that the factual behavior of men, bound by this normative order, does correspond in fact—at least to a certain degree—to this normative order; that, therefore, a certain minimum of parallelism between the normative order and the natural order, *i.e.*, the order based on the relation of causality, exists. Often a juridical order comes into existence exactly in this way: that men behave in fact in a certain way during a long period of time. It is custom which creates in men the conception that to behave as one has behaved for a long time constitutes a legal duty. In spite of all this, there is no identity between the factual order, determined by the relation of causality, and the normative order regulated by the law.

If we term the method dealing with the reciprocal behavior of men, as determined by the relation of causality, as the "sociological" method, it is clear that sociological and juridical methods must be distinguished clearly and on principle, in spite of all the relations between natural and normative order. For example: If we consider the Italo-Abyssinian War from the point of view of law, our consideration cannot lead to an analysis of the reasons that determined Italy in her attitude toward Abyssinia, but only to point out those norms of international law which are pertinent to the object in question. Juridical analysis can only and always lead to the contents of legal norms, never—in contradistinction to the sociological method—to facts being considered as reasons. All that seems to be a matter of course in the given example which, on purpose, has been chosen as being very simple; nevertheless, the frontier between these two methods is frequently violated. It happens only too often that studies pretending to be juridical do not state the legal rules involved in the problem but inquire into the reasons that caused the creation or the adherence to or violation of these rules. It is this confusion of methods

which is denounced and combated by the pure theory of law—not because the sociological method is superfluous (its value and necessity are, on the contrary, beyond question) but because it wishes to avoid the confusion of two methods that are completely different and the errors that necessarily must follow from such confusion.

But the juridical method, which has to deal with *law*, must defend its independence and its nature not only against the sociological method, which has to deal with the reality determined by the relation of causality, but also against other orders which equally pretend to regulate human behavior. The most important of these other orders is the moral order, which, for our purposes, includes also the religious and ethico-political norms. It is a commonplace that law and morals (in the broadest sense of the term) are not identical; that there is moral as well as immoral law; that men may be obliged in law to do something forbidden by ethics. This independence of the law and morals is expressed in the phrase "*positive law*." This phrase, which has many meanings, means in this connection that law, more or less arbitrarily created, has value only for a determined epoch, at a determined place, for a determined group of men, *i.e.*, that law has only a relative value; whereas morals—especially if of a religious nature, revealed as the will of the Deity—represent an absolute value. And in so far as morals address to the authorities which create the law the demand that the law should be morally good—*i.e.*, *just*—morals have a very analogous relation to the law as the law has to the reality of the social behavior of the men subject to the law. Just as these men ought to correspond in their behavior to the positive law, the positive law ought, in its contents, to correspond to morals or—and this is only another word—to justice. Compared with the demands, *i.e.*, the value of justice, positive law is a reality, legal reality, just as is the factual behavior

of men compared with positive law, which addresses its norms to these men. In this way the antithesis between value and reality becomes a relative one and the law becomes value and reality, according as it is considered as a *norm*, compared with the order of factual happenings, determined by the relation of causality, or as the *act* of creation or adherence to a norm, compared with the normative order of morals. This double nature of law renders still more difficult the separation of law—a methodological necessity—as a normative order from the reality determined by the relation of causality and of positive law as a social reality from the normative order of morals.

The demand to abstract from justice, if one is occupied with the cognition of positive law (with the cognition only, not with the creation, which is a procedure of human will), meets with difficulties that are almost insurmountable. Even if we—to quote once more the preceding example—consider the Italo-Abyssinian War strictly as a legal problem, not only the conflicting parties but also the authorities functioning as judges and especially public opinion will be inclined to consider, apart from the causes of the conflict, whether the behavior of these two States is just or unjust; for the longing for justice, the realization of which the positive law is supposed to give, is so powerful that the tendency of the emotional component part of our mind to determine the rational one, a tendency that exists in general, is never stronger than when the cognition is concentrated on a social, and particularly on a legal, problem. Nevertheless, scientific (*i.e.*, rational) cognition concentrated on positive law must not only renounce the temptation to look for justice in positive law and to find or to miss it, according to the subjective conception of life of the scholar; nay, scientific cognition as far as it—no longer jurisprudence, but sociology or philosophy—takes justice itself as the object of its research, must even reach the conclusion that



there is no justice, that there can be no justice in that sense, though it is passionately desired and though it is set up as the ideal of positive law.

From the point of view of rational cognition, there are only interests and, consequently, clashes of interests, the solutions of which are reached through an order of interests, an order that either satisfies one interest at the expense of another or brings about a compromise between opposite interests. That the one or the other order alone has an absolute value, *i.e.*, that it is "just," cannot be proved by rational cognition. If there were justice in that sense, if in reality only certain interests are to be made victorious over other ones, positive law would be entirely superfluous, its existence completely ununderstandable. If there were a social order, absolutely good, following from nature, from reason, or from the divine will, the activity of the legislator would be the idle attempt of artificial lighting in full sunshine. And the usual objection: that there is a justice, but it cannot be or—what amounts to the same—it cannot be unequivocally determined, is a contradiction in terms, a contradiction serving as a typically ideological veil of the true, and, alas, too painful fact. Justice is an irrational ideal. It may be indispensable for the will and the actions of men, but it is inaccessible to cognition. Cognition can only deal with positive law. The less you try to distinguish positive law from justice, the more you yield to the endeavor of the legislating authority to consider the positive law as the just law, the more you further the ideological tendency, characteristic of the classic-conservative doctrine of the *jus naturae*. This doctrine was not so much interested in recognizing the positive law as in justifying it, in transfiguring it, by proving that the positive law is the outcome of a natural, divine, or reasonable, *i.e.*, of an absolutely just, order. On the other hand the revolutionary doctrine of the *jus naturae*, of smaller importance in

the history of jurisprudence, is inspired by the opposite aim: to question the validity of the positive law by pretending a contradiction between positive law and a presupposed absolute order. That is why this doctrine sometimes pictures the legal reality in a more unfavorable light than would correspond to the truth.

These *ideological* tendencies, the *political* aims or effects of which are obvious, still dominate our present-day science of law, in spite of the alleged victory over the doctrine of the *jus naturae*. It is against these ideological tendencies that the pure theory of law is directed. It analyzes the law as it is, without justifying it as being just, without disqualifying it as being unjust; it deals with the real and possible, not with the right law. By freeing the law from the metaphysical mist with which it has been covered at all times by the speculation on justice or by the doctrine of the *jus naturae*, the pure theory of law intends to understand the law as a *social technique*. It attempts, therefore, an aim wholly neglected by traditional jurisprudence: to make use of the results of theoretical cognition for the practical creation and application of the law. It is in this sense a radically realist theory of law. It declines to give a moral judgment on the positive law. As a science, it sees its task exclusively in understanding the nature of the law through an analysis of its structure, and, by doing so, in creating the possibility of an applied science of law. It certainly declines to serve political interests, whatever they may be, by furnishing them the ideologies by means of which the actual social order is to be legitimated or disqualified. It finds itself, therefore, in open contradiction to traditional jurisprudence, which has always—consciously or unconsciously, more or less—an ideological character. It is exactly by its *anti-ideological* tendency that the pure theory of law proves itself the true science of law. Science as cognition has always the imminent tendency to unveil its object. But ideology veils the reality, transfiguring the

reality in order to conserve and defend it, or disfiguring the reality in order to attack, to destroy, to replace it by another reality. Every ideology has its root in volition, not in cognition, arises from certain interests or, better, from other interests than the interests in truth, a remark which, of course, does not imply any assertion regarding the value or dignity of these other interests. Cognition always will tear the veils laid around things by volition. The authority creating the law and, therefore, wishing to conserve it may ask whether a cognition of its products, free from ideology, is desirable; the forces tending to destroy the present order and to replace it by another one believed to be better will not have much use for such a cognition of law. But a *science* of law does not care for the one or the other. Such a science of law the pure theory of law wishes to be.

It is this postulate of a clean *separation of jurisprudence from politics*, it is the inexorable critique of political tendencies, followed by certain well-known representatives of the newer German jurisprudence, that explains the bitter enmity toward the pure theory of law. It is not a scientific legal question, it is the relation of the pure theory of law to politics, the thesis that the science of law, like every science, must be free from politics that gives the reason for the passionate opposition which constitutes the background of the fight against the pure theory of law, a fight carried on with all weapons. For this fight touches the most vital interests of society and—last, not least—the professional interests of the jurists. The jurist will not—as can well be understood—refuse to believe and to make others believe that he possesses in his science the answer to the question, how conflicts of interest within the society can be “rightly” solved, and that he, because of his cognition of the law, is also authorized to shape its contents; whereas, as far as the creation of the law is concerned, his only advantage over other politicians is that he is a technician of society.

Taking into account these—it is true only negative—effects produced by the postulate of the separation of jurisprudence from politics, taking into account this self-restriction of the science of law, viewed by some as a degradation, it can well be understood that the enemies have little inclination to be just toward a theory proclaiming such postulates. In order to combat it, its real nature must not be recognized. That is the reason why the arguments, directed against it, balance each other and render their refutation almost superfluous. They are directed not so much against the pure theory of law as against a misconception of it, concocted according to the critical needs of the opponent. The pure theory of law has no contents—is a mere game of empty conceptions, so some say contemptuously; its contents are, because of its subversive tendency, a serious danger to the State and its law, so warn the others. One of the most frequent objections to the pure theory of law is: It is free from politics and, therefore, estranged from real life, scientifically valueless. But not less frequently you will hear: The pure theory of law is not even able to fulfill its own basic methodological postulate; it itself is nothing but the expression of a certain political value. But of which political value? Fascists see in it a democratic liberalism; democrats regard it as a pacemaker of fascism. Communists disqualify it as the ideology of a capitalistic etatism; nationalists and capitalists either as pure bolshevism or as concealed anarchism. Some say that its spirit is related to the Catholic thinking of scholastic philosophy, whereas others believe to see in it the characteristic criteria of a Protestant jurisprudence. And there are others who would like to stigmatize it as being atheistic. In a word, there is no political movement which the pure theory of law has not yet been suspected of favoring. But nothing could prove better its *purity*.

The methodological postulate of purity cannot seriously be questioned if something like a *science* of law can exist at all. It

may only be doubtful as to what extent it is possible of fulfillment. Certainly the very great difference which exists here between natural and social sciences must not be overlooked. True—even natural science may be in danger that political interest will try to influence it. History shows clearly that a world power deemed itself endangered by the truth as to the course of the stars. But if natural science has been able to assert its independence of politics, the reason is that a very important social interest was connected with that victory: the interest in the progress of technical science, a progress that can be guaranteed only by free research. But the road from social theory to an evident progress of social technique is not so direct, not as obvious as the road from physics and chemistry to the triumphs of modern machines and of therapeutics in medicine. The social sciences, not yet fully developed, still lack a social force strong enough to resist the overwhelming interest which those actually ruling as well as those who press toward political power have in a theory pleasing to their wishes, *i.e.*, in social ideology, especially in our epoch shattered by the World War and its consequences, an epoch in which the very basis of social life has been profoundly shaken and in which, therefore, the internal and international contrasts have been tremendously aggravated. The ideal of an objective science of law and of the State has no chance of general recognition except in a period of social balance.

It seems, therefore, that a pure theory of law is untimely today, when in great and important countries, under the rule of party dictatorships, the most prominent representatives of jurisprudence know no higher task than to serve the political power of the moment. But the pure theory of law does not despair; and not the last reason for its hope is the existence of other and more fortunate cultural communities, first of all of the Anglo-American world, where the freedom of science and the ideal of objective

cognition continues to be respected, where political power is more stabilized than elsewhere, but where, nevertheless, or perhaps just on account of that, the mind is held in greater esteem than power.

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NOTE

<sup>1</sup> Cf. Kelsen, *REINE RECHTSLEHRE* (Vienna, 1934) (with detailed bibliography); Kelsen, *The Pure Theory of Law* (1934) 50 L. Q. REV. 474 and (1935) 51 *id.* at 203; Lauterpacht, *Kelsen's Pure Theory of Law* (Oxford, 1933) MODERN THEORIES OF LAW; Voegelin, *Kelsen's Pure Theory of Law* (1937) 42 POL. SCI. Q. 268; Kunz, *The Vienna School and International Law* (1934) 11 N.Y.U. LAW QUARTERLY REV. 370.

# WAYS OF THINKING ABOUT RIGHTS: A NEW THEORY OF THE RELATION BETWEEN LAW AND MORALS

WILLIAM ERNEST HOCKING

## INTRODUCTION

ON the standing question of the relation between law and the ethical sense of mankind, two propositions may be regarded as established. First, that legal and moral principles are not the same. Second, that legal and moral principles are not wholly independent of one another.

The modern world has been particularly emphatic on the first of these propositions because it had to secure the autonomy of mature legal theory as against the earlier claims of a dominating theology-and-ethics. Modernity has been largely occupied with making differentiations, staking out regions of secular freedom, and escaping from a priori sentiment into objectivity.

But modernity has gained its point—and now can afford to note that a difference does not mean an absence of relationship. During the past century numerous attempts were made to recover balance, defining a positive connection between law and the ethical sense which should not deprive law of its hard-won liberty. In very different ways, von Jhering and Jellinek, Stammler and Korkunov undertook to provide law with an ethical steering gear that should not quarrel with nor attempt to displace its realistic cargo. The recurrence of such attempts, and the recurrent rejection of them for a more thoroughgoing realism, indicate not alone that further efforts are in order, but that progress in this problem is the chief task of legal philosophy at the present moment.

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Now a thoroughly realistic study of legal phenomena does not escape the factual influence upon law of the ethical judgments of mankind: on the contrary, this is one of the hardest of the hard facts it encounters.<sup>1</sup> It is one of the facts of Western psychology—and it is spreading to the Orient—that individuals presume themselves to have rights, and that they further presume these rights to be founded in a general principle of justice. This temper is doubtless in part a product of three hundred years of public discussion of the nature of law, but however it came about, it is there; and its presence influences the growth of law.

New theories of the State, or recrudescences of older theories, which dissolve individual rights into some form of public will or public convenience, however great their political consequence, have had so far almost no effect in displacing this prevalent conviction: the average western individual still believes that the substance of the common law is an incorporated minimum of ethical requirement in behavior. And if any one speaks of legal reform, this typical individual will quite readily assume three things: one, that any legal reform would do well to base itself on a realistic study of all the factual circumstances of existing law; two, that the facts thus brought to light do not yield the standards for their own criticism; three, that the type of standards to be employed will depend on the kind of criticism to which the facts are subjected, and since it is always pertinent to ask what the law "ought to be," that an ethical standard will somehow have to enter into any new proposals.

The phrase, "a right," seems on its face to lend some color to this common prejudice, for it appears to indicate a working union of an ethical judgment with a legal rule. How would such a union have been brought about?

In some cases we can roughly follow the process. Given a set of human interests that meet and conflict, there is first a stage



of experimental adjustment which tends to settle into custom; law then enters to define and regularize the still plastic custom. So far we have nothing but expedient arrangements into which all sorts of motives—greed, fear, prudence, and a faint preference for orderly and regular settlements rather than turbulent and *ad hoc* settlements—may have entered. But a second look may show the moral ideas of the time in operation as a sort of negative control, in the sense that no arrangement could gain general acceptance so long as the prevalent moral sense remained in protest. We seldom find morality coming forward with a positive and vocal demand in lawmaking; it is usually a negative and silent factor. It is worth-while to consider the hypothesis that custom is commonly a synthesis of the expedient and the just in which the ethical prejudice acts not as a constructive agent but as a necessary condition of stability.

For example, falling into line at ticket windows is a Western custom which might conceivably sometime become a requirement of statute. As a custom it is obviously expedient, but it could not be expedient if it did not, at the same time, satisfy the rough ideas of fair play entertained by the members of the crowd. Ethical notions are not the substance of the rule: this substance is provided by the interests of ticket buyers and sellers. But these interests accept the form of the squirming line-up at the demand of "First come, first served," because this rule-of-thumb appears to the crowd concerned a rough approximation to justice. When this form is achieved, an individual assumes that he has a "right" to his place in the line.

On this analogy, we would distinguish in the emergence of a legal right two functions—one making the content of the right, the other determining its form. The content-making function is the pressure of all the interests at play; the forming function is the effective ethical sense of the group. This forming function

neither antagonizes the interests nor supplants them; without the interests the forming function would have nothing to do—it presupposes them. On the other hand, it is independent of the interests in the sense that it is not made by them. Apart from the entrance of the ethical demand, the several interests pressing to be satisfied would settle the matter—not quite formlessly, but according to a “balance of pressures” in which the more potent elements dominate the rest. If and when the ethical factor enters, the form it proposes supersedes the pressure-form; and if law should supervene, it would normally incorporate the ethical form rather than the pressure-form—such is the theory I propose.

This view (which we may for brevity call the *formative theory* of the role of ethics in lawmaking) does not identify law and morals either in scope or in nature; for law requires while morals leave free, and law casts into a general social mold what morals propose as individual duty. But it indicates what I should regard as the natural and minimal organic connection of the living law with the living ethical convictions of a people.

What significance this theory may have will best be brought out by contrast with some of the prevalent ways of thinking about rights, which either exclude the ethical factor or give it a different mounting. In this discussion I make no apology for the occasional recital of commonplaces, since advance in this subject calls more for clarity and a true placing of the elements than for erudition or that subtlety which is commonly the child of confusion.

#### LEGAL RIGHT BASED ON NATURAL RIGHT

The most usual way of thinking about rights among non-professional people is still expressible in the form that rights are in some sense or other “natural.” The ambiguous word “natural” in this connection usually signifies two things: first, that the

fundamental rights are a sort of birthright, as if, having called him into existence without his consent, the world owed each new human being some gift by way of equipment; second, that the fundamental rights are reasonable in the sense of being self-evident. It is not difficult to puncture either of these assumptions; and the "natural rights" theory has now been so long discredited by a devastating criticism that the only possible originality is to revive it again, as is being done! The logical situation is clear: a valid idea may be defended by bad reasons; destruction of these reasons is not the destruction of the idea. But what is to be rebuilt is not the old group of axiomatic absolutes which were fairly describable as so many chunks of pure ethical gold imported into the foundations of law. If there be a natural right, there cannot be more than one. But reserving this possibility, the views we have to consider are those which were engendered by the failure of the old natural right to set up a bond between ethics and law.

One of the suspicious features of the alleged natural rights was that they had to be defined and limited, which immediately contradicted their absoluteness. And the presumption is strong that the authority which limits a right is at the same time the authority which establishes it. The sovereign power in any state, be it individual or corporate, thus appears as *ipso facto* the creator of rights *qua* rights. Any activity for which I claim liberty may be "natural"; but as natural it is neither right nor wrong, whether in ethics or in the law. And if it is to be dignified with the character of rightfulness, while my conscience may raise the question for my private self, there is only one agency that can give it legal sanction and thus stamp it, for civic purposes, as a right. The considerations here in play may, for the sake of compactness, be summarized in the form of a logical dilemma, as follows:

Natural right must either coincide with legal right or differ from it. If it coincides, it is superfluous; if it differs, it is futile.

In either case, then, it is devoid of importance for the conduct of human affairs.

#### LEGAL RIGHT BASED ON AUTHORITATIVE DECISION

This appears to leave positive law in the field as the only source of significant "rights," which is presumably the position of the "analytical" school of jurisprudence. But the logic of this dilemma, as of most dilemmas, is exceedingly weak. We might conceive a believer in natural rights as retorting with a dilemma at least equally cogent: Legal right either coincides with natural right and is superfluous; or else it differs from natural right, and, as one of the parties of an issue, is wholly incompetent to judge the case in its own favor!

But from the point of view of our own inquiry, we might give the case a somewhat different turn, observing that this "analytic" or, as we might properly call it, the "artificial" theory of right has all the invulnerability of a truism, and all the uselessness. Our dilemma is: Either this theory is a simple analysis of the idea of a legal right, in which case it is a tautology and answers no questions; or else it identifies legal right with right in general, in which case it is evidently false.

And here we might leave the matter, if it were not for the widespread allegiance which this school still enjoys. Its ground is clearly not logical—it is rather, one surmises, professional—but there is a method in it which deserves a further word of examination.

The theory of sovereignty as the source of legal prescription is itself a fiction, and is justified, as are other scientific fictions, as an abstract working hypothesis, representing in ideal clarity a genuine factor in the making of law. The sovereign issues the law; it presents itself as his command; the date of its validity is determined by his proclamation; at that moment all his subjects

are bound under the absolute duty of obedience: this is the essence of legal structure under all constitutions. The psychology of the sovereign is, for the purpose of this analysis, irrelevant.

This psychology is, however, highly important to the sovereign and to his subjects. For the sovereign has to decide in some way *what rules he will launch* with this regalia of a compulsory experiment. And since his position as sovereign depends, even in the Austinian analysis, on the habitual obedience of a majority of the inhabitants of his domain, the views of these subjects as to what rules they can accept or entertain as experiments will be a factor in his prior reflections.

Let us personify one of these hypothetical sovereign entities and imagine him engaged in the business of devising a law to provide for a new problem—let us say, the rights of airways. Suppose him to turn to an adviser, asking him what he would consider the right solution. Suppose the adviser, as a devout Austinian, to reply, “Whatever your majesty deigns to command will be right.” The sovereign might justly reflect that the impeccable accuracy of this response was consistent with its complete footlessness, and that such an adviser might as well be decapitated. But if he were in a dialectical, rather than a punitive mood, he might play with the adviser by accepting his remark at face value and drawing a few consequences, as follows:

SOVEREIGN: If right is what I, the sovereign, command, then by simply commanding anything I *ipso facto* make it right?

ADVISER: Yes, Your Majesty.

S: Then let me issue the law that any adviser who gives useless advice shall be beheaded.

A: Well, Your Majesty . . . uh . . . there seems to be . . .

S: You do not suggest that there would be place for criticism of a really sovereign act?

A: Perhaps if one considers the sovereign entities now active abroad, one would hesitate to call everything they prescribe right purely on the ground of its enactment.

S: Now I think of it, I seem to have heard you remark that the Nazi regime could get away with a good deal but not with everything.

A: It would seem that even racial discrimination has been legalized. . . .

S: And is therefore right?

A: I would prefer to confine my assertion to the legality. . .

S: But we are asking about the term "right." . . .

A: I must recognize a psychological limit: the dictator today is careful to remain within the region of possible popular accord. . . .

S: You mean, he may have heard of Bismarck's Kulturkampf, and is therefore prudent; but in theory . . .

A: Naturally, if he should try to reinstate the worship of Woden, or human sacrifice, he would fail.

S: We are not concerned with his failure to control the people; we are concerned solely with his possible failure in making what he commands *right*. If there are any limits at all to what the sovereign can make right, then whether he fails or not your theory fails. And if it fails, no enactment is "right" merely because it is an enactment.

A: I do not see, at the moment, how to meet your point.

S: Then we must look to some more ultimate source of standards?

A: I believe you are right, Your Majesty.

S: But not merely because I said it?

A: No, Your Majesty.

#### LEGAL RIGHT BASED ON CUSTOM

The psychology of decision in the framing of laws is not a part of legal theory, but it contains elements which legal theory cannot neglect. *Reference to custom* is one of these elements. It be-

comes the defining mark of a third way of thinking about rights: rights are historical growths or, as we are now more disposed to put it, law is the coinage of custom.

Law may be a precision of vague custom; it may be a decision between competing customs, giving one of them the right of way. In any case, all new lawmaking seeks for precedents and analogies on the ground that whatever is right for any group of people has already been expressed in the principles of practice that they have found satisfactory. The maker of law must be a finder of law; the proclaimer of law must be a declarer of what has already been.

There are two variants of this historical way of thinking. One is relativistic: ideas about right are phases of social adjustment; they do vary, and ought to vary, from people to people. They may be governed largely by diverse ways of living, by geography, by pioneer or settled conditions, by the mode of economic production as Marx suggests; in any case, the ideas of right have to serve to sustain a working equilibrium of variable factors, and are, therefore, nontransferable from one people to another, or, indeed, from one age to an age remote in its conditions. They must be specifically the "rights of Englishmen" or the "rights of Americans," not deductions from abstract and universal principles which have no reference to time.

The other variant is romantic-idealistic: ideas about right are, to be sure, phases of social adjustment, but these adjustments have a common character, due to the common nature of man, which we have to learn by long experiment. Every legal judgment is under two impulsions: one to reach a harmonious balance among the interests of a given people at a given time; the other to bring into that balance the eternal element of rectitude. Relativity may be allowed to take charge of the essentially "positive" elements of the law; but the rightness of a right is not found in just these elements.

On this second ground, custom *per se* is no authority, and history has no magic to make any practice right. History is merely the method whereby mankind wins its hold upon the unhistorical rightness of things. So far as Savigny and his successors used history in this way their method may be historical but their conception of rights is not. They do not, therefore, deserve the name usually given them of "the historical school." It is only the first or relativistic form of the historical thesis that is distinctive and sets up the social habitudes as exemplary.

Now our dialectic, applied to this thesis, would simply inquire whether custom can make right anything whatever. Sumner in *Folkways* asserts as much: "The *mores* can make anything right." This view is supported, to the imagination, by the wide diversity of customary attitudes toward murder, infanticide, fantastic forms of sex relationship, and the like, upon which anthropologists love to divagate. But all such appeals to imagination tend to limit the imaginative exploration to what the anthropologist wishes to display. Use the imagination with a greater degree of liberty, and one lights upon many things the *mores* never try to make right, such as general murder, general suicide, general promiscuity, general theft, general child slaughter. The peculiar and exceptional sanctions that one turns up in odd places for special channels of murder, theft, and the rest are carefully limited by the same *mores* that provide for them, and the good faith of anthropology is at stake in making this limitation clear. The *mores* cannot make everything right. And if that is true, they alone cannot make anything right.

But assume that custom does determine right; then slavery, infanticide, cannibalism were right in their own time. And having been right, by the sole authority of custom, it was never right to rebel against them. The reformer, on this basis, is always wrong.

Such a conclusion exhibits the fallacy of the appeal to custom



or to history as a finality. The evidential value of custom lies solely in the fact that it exhibits a working equilibrium, *in which men's ideas of justice at the given time were part of the mechanism*; and what in experience has worked well has a pragmatic presumption in its favor, so long as neither circumstances nor ideas undergo change. But since changes are forever taking place, the appeal to history as such is an appeal of diminishing value.

Custom, then, is a symptom, not a creator, of right. What is the creative factor which it covers? To many the answer is obvious—the adjustment of individual interests within a maximum of social welfare. This fourth way of thinking is doubtless the most prevalent of contemporary theories.

#### LEGAL RIGHTS AS CONDITIONS OF SOCIAL WELFARE

The idea of rights as general conditions of social welfare has a long history and a hundred varieties, which a technical study ought to distinguish. The utilitarianism of Bentham and Mill, *Der Zweck-im-Recht* of von Jhering, the pragmatism of Duguit and Dewey, the functionalism of Tawney and his confrères, the sociological jurisprudence of Pound, and—I venture to think—the relativistic Hegelianism of Josef Kohler may be taken as illustrative of the spread of the way of thinking now before us. For the sake of brevity we shall have to make the effort, rather more exacting than dealing with each brand severally, of grasping the common essence of these allied methods. This essence I conceive to be the belief that “rights” are distributive means to an independently definable social good. As giving law a goal in the field of value this theory brings a standard to bear on all existing law which might be called in a broad sense ethical, but it clearly excludes reference to independent ethical rules.

As a matter of history, this theory has come in like a lamb and gone out like a lion. It enters as a humane instrument of legal

reform. Its role, both in England and America, has been to break up the rigidities of legal systems based on natural right or on artificial right. The rooted perversities of the "due process" clause and its applications could hardly be met except by a fresh look at the purpose of all lawmaking, and "social welfare" presented itself as a plausible standard, used with impressive effect in our own community by such men as Holmes, Cardozo, Brandeis. The "social welfare" in some form or other is the slogan of liberalism. But who is to judge the social welfare? If it is everyman's guess, liberalism may proceed with its beneficent work. If it must be authoritatively interpreted, we invite the return of Leviathan. Hence we have today the phenomenon of totalitarian dictators using the language of a pragmatic liberalism: "Fascism protects the nation, affording liberty as a concession to individuals, so long as they act in harmony with the interests of the whole." Fixed principles of right are the bane of the reformer; they are also the bane of the dictator.

We shall also be brief with this way of thinking: our dialectical method enables us to push it to the eventual issue. If right is a function of social welfare, then whatever social welfare requires is right—it acts logically as a general precept of eminent domain over the privileges of individuals. It is hard to see, if social welfare is to govern, why we should not free ourselves from many compunctions in regard to the regulation of life and death, the extinction of criminals and the unfit, the rigorous control of birth, vivisection and experimentation on infants, the expulsion of social nuisances, the sterilization of entire social groups which we think best not to encourage. In any case, it would always be in order to do a minor injustice in order to secure a major general good; condemn an innocent Dreyfus, for example, in order to save the prestige of a military class.

If we reject these inferences from our principle, we reject the

principle. But our discomfort in view of these consequences may be due either to the feeling that some more ultimate standard of right is being neglected, or to the feeling that the social welfare is an ambiguous concept, not capable of determination without first considering what is right. From the psychological point of view it is evident that the "social welfare" is at the mercy of existing sentiments about "right," so much so that the factor which we have learned to call "morale" holds the balance between a smoothly running and a chaotic state of things when all the material elements of welfare are present. A suspicion of injustice in management will sour a situation otherwise satisfactory. I remember San Francisco in the summer of 1906, when persons who had lost everything in the fire and were making a new brotherhood of hope and energy, showing all the mental traits of "welfare," were turned into an angry and complaining community by what they conceived to be favoritism in the dispensing of benefits by relief organizations. No one who has any firsthand experience with the mental characteristics of human groups can be misled for a moment by the specious assumption that there is an aggregate called "welfare" which can, for scientific purposes, be made an independent basis upon which right can be built.

If, then, right is an element of welfare, the logical grounding of the pragmatic theory is undermined: It is seen to be a vicious circle in definition. The practical value of the pragmatic method appears to be this: that expediency does not make right, but that inexpediency is a circumstantial evidence of wrong. The negative formulations are more valuable than the affirmative.

Nothing can be right which is (surely and in the long run) inexpedient.

Nothing can be expedient which is (surely) wrong.

For example, suppose that a vigorous humanitarian policy, by attending to sanitation and maternity care, thereby lowering in-

fant mortality, results in an increase in population and appalling poverty; we are justified in the judgment that there is something wrong in the policy. But we are not justified in judging that *any* means which will alleviate the symptoms is therefore right. Among the hundred possible measures—cessation of medical care, birth control, sterilization, euthanasia—those that appeal to the prevailing ethical sense as inadmissible or as dubious will have to be excluded as inexpedient no matter how efficient they might be as means to the proposed end. The question, What is the relative value of several measures in terms of the general welfare? is logically indeterminate until the ethical issues are settled, or so far settled that the community is ready to adopt an experimental attitude.

It is evident, then, that while there are many problems of the social order in which there is no issue present except the issue of relative expediency, wherever the ethical question does enter it requires an independent solution, and social welfare per se fails as a standard of legal right.

#### THE INDEPENDENT STANDARD

The last three ways of thinking about rights which we have glanced at are the chief contemporary ways of attempting to escape the direct pertinence of ethics to the construction of law—law as enactment, law as history, law as social adjustment. Each of them singles out one actual factor of the lawmaking process and regards it as the decisive factor by an unjustifiable exaggeration. The struggle and equilibrium of interests under the guidance of a vaguely felt total of social weal, the molding of the outcome into custom, the coining of custom into authoritative law—all these belong to the biology of legal gestation; none of them has any concrete meaning without the others. And neither any one of them nor all together can escape the

formative demand of the ethical sense when that sense comes into play. The place for this independent formative function is what the older "natural right" was endeavoring to preserve. It remains to consider whether we can give a more acceptable account of its meaning and effect.

It may clear up one source of difficulty if we remark that the bearing of ethical right on legal right is due not more to the specific nature of law than to human nature and the nature of ethics. It is due to the fact that the *same behavior* which is the subject matter of law comes or may come under the cognizance of ethics; and that the *man who is behaving* cannot divide himself into two personalities, a legal and a moral personality, for the purpose of an identical action. If he has to raise a moral question in regard to the act, the law has to take that fact into account. *For the subject matter of law is not the abstract action, but the man behaving*; hence everything that enters necessarily into the man's consideration of a given deed enters by consequence into the law's consideration of the same deed.

This indicates the futility of a distinction commonly drawn between law and ethics, to the effect that law deals with external action whereas ethics deals with inner motivation. This would imply that ethics could quit itself of concern with overt acts, and law be indifferent to motivation! Kant lends himself to this folly, and many have followed him there, among whom we must number Pollock and Vinogradoff.<sup>9</sup> It is true that moral problems are matters of conscience and are referred to inner regions of motivation, highly individual and inaccessible to either observation or social control. But what are these hidden motives concerned with if not with decisions regarding behavior? Have the "dictates of the heart" nothing to do with a man's overt actions? Can a Thoreau whose conscience opposes certain forms of taxpaying compound with his conscience by

reflecting that it is only his physical hand that makes the payment? "Dictates of the heart" are meaningless unless they affect first the arm-and-leg action of the individual, and then institutions. It goes without saying that law, which involves compulsion, cannot require morality as such, which involves choice: the law can light only on man-behaving, but in so lighting it is concerned with the kind of man as well as with the kind of behavior. It fact, it has no way of defining the behavior except with reference to the mental agency it springs from. Theft is not the loss of property by one man and the gain of the same by another: theft is my arbitrary unilateral redistribution of wealth to my advantage without reference to the accepted system in the process of transfer—its definition is mental. And the reason that theft is socially dangerous is not that losses and gains are dangerous, but that this kind of mentality, when it defines a genus of activities, is dangerous. There is no certain argument from any given physical action to any motivation: the outward and the inward do not stand in strict one-to-one correspondence. But when behavior takes on habitual forms, involving similar responses of groups of persons, there is a *presumable* motivation, upon which the law can act, and indeed must act. Thus, while in general the law is concerned only with the fact of peddling and not with what a man peddles, the time comes when it must decide whether the man who peddles heroin is doing a "legitimate" business. Checking his activity does not necessarily check his motivation; if it did, the problem of crime would be immeasurably simplified. But there are two absurdities which we can avoid in this connection: one, that the law would be reluctant to change his motivation, if it could do so; two, that the checking of action—with the powerful social judgment involved—has *no effect* on motivation!

The existence of law is, in fact, a powerful educational agency,

and intends to be. Its relation to morals is not one-sided: each affects the other. The general effect of law on morals is to raise the level of the inner moral debate by making a whole group of decisions semi-automatic. You and I waste little time in arguing with ourselves whether or not to kill an obnoxious neighbor; our refraining from murder has little moral value because the presence of the powerful prudential consideration against murder established by law tends to deprive my nonaggression of ethical worth. If this were all, we might say with the anarchist that law is an enemy to morals because it destroys the ethical value of right conduct. But this is not all: it sets my conscience free to deal with other issues, and in this way promotes the gradual sensitization of conscience.

In brief, law falls in behind the advance of ethical reflection, attempting to make unanimous in behavior what ethical sense has made almost unanimous in motive, and in so doing (a) to make the motivation itself more nearly unanimous and (b) to transfer the released ethical energy to a new level of issues, which in turn will eventually become material for new law. Law is the great civilizing agency it is, not because it throws conduct into artificial uniformity and order, but because it is a working partner with the advancing ethical sense of the community.

#### LAW VERSUS MORALS

If the foregoing theory is valid we can understand why it is that conscience now and again throughout history falls out of step with law, and law with conscience. For conscience is forever running into new regions of scruple; solutions acceptable at one time (such as slavery or polygamy) become first suspect and then repugnant. Conscience is a sort of private scouting function and can have no hold on law until its proposals achieve the objectivity of an approximately common sense.

But since private scruples are never satisfied to remain such but seek to spread themselves by persuasion, each private scruple squints toward an eventual alteration in the law. During the process of debate, law frequently comes to the aid of a wobbling conscience by proposing a tentative or experimental solution; it is likely that conscience seldom gets all the data of its problem until alternatives are legally tried out, and social experience, coming to the aid of individual experience, brings to light many a region of consequence not before observed. Thus law contributes to that clarity and certainty of conscience which then becomes a formative factor in the revision of law.

It is in these periods of tension between law and conscience that the strict interpretation of law is likely to raise its head and disavow responsibility to ethics. We are now in a position to appraise the nature of this conflict.

It is not a conflict of law with ethics, but of ethics with ethics, for while a great part of the law is dealing with issues that are not primarily ethical at all but simply require some conventional and acceptable decision, it becomes morally right after such decisions are made to conform to them on the ground that it is always wrong, other things equal, to disappoint an aroused expectation. Thus the principle of *stare decisis* becomes an ethical principle; that is, ethics demands that authoritative decisions shall be reached, that law shall exist and be stable in its operations. When, therefore, a strictly legal decision finds itself at odds with the ethical sense of the time, it is a case of ethics against ethics—a general ethical principle against a special ethical demand.

But since stability is a general form—*i.e.*, one can be stable in any one of many positions—the new ethical criticism becomes a relentless force compelling the law to *redefine the position in which it is to be stable*. Thus a tension between law and morals,



provided the moral solution is clear, is one that can be settled in only one way: the ethical right must eventually become the legal right.

#### THE ETHICAL INVARIANT

The moral solution is not always clear. There is, for example, no such thing as precise justice in distribution when contributors to a product have furnished elements qualitatively unlike. There is no perfect division of damage when each of two contending parties has been at fault. And in such cases where ethics falters the law is likely to falter also.<sup>3</sup>

But it would be out of proportion to dwell exclusively on the explorative, groping, and individually variable aspects of the ethical sense. There is a large region in which ethical judgments having a quasi-mathematical character have been clear enough to serve as a starting point for law. Here Kant's suggestion that legal right contains a logic of consistency is to the point and carries us a certain distance. Kant assumes that men are freely acting and that they know what it means to regulate these actions by rules. An action is right when it conforms to a rule which would make it compatible with the free actions of all other persons adopting the same rule. Right thus presents itself as the solution of a problem: to find the rule which, (a) when made universal, (b) will harmonize the voluntary acts of men one with another.

This Kantian formulation represents fairly well the simple considerations which would yield the ingredients of a *jus gentium*. It can be simple and a priori because it assumes the essence of justice to consist in equal treatment of equal entities, since for law as for ethics each free person is to be considered an end in himself. Kant thus gives formal endorsement to that logic of comparison by which the man in the street reaches his view of his rights: "Whatever right you have, I have the same." He im-

proves on the "natural-right" theory by referring the plural rights to a single principle, which alone claims absolute validity. Yet this principle and the rights deducible from it are natural in the sense that they belong to the generic man by virtue of his humanity; they are, therefore, like other natural rights unconditional and costless. Their equality is the consequence of the inherent generic likeness of the members of this class.

It is here that we recognize a vital defect in the Kantian basis. While the fiction of equality is necessary as an administrative convenience (and also immensely simplifies the problem of an *a priori* moral calculus), it is inconsistent with Kant's original premise; namely, that the only thing of unconditional worth in the world is not humanity in its generic character but the "good will." To adhere to this premise is to abandon any view that institutes equality between good wills and the various shadings of the less-than-good. It is also to abandon the fateful assumption of the natural-right school that any right can be unconditional and costless. We shall not have a satisfactory ethical basis for legal right in the period ahead of us until we include this principle that there is no right which does not bear a condition, a prior qualification, and that this condition lies in the quarter roughly designated as the "good will."

Further, Kant's basis is unsatisfactory in its very rationality, so far as this is divorced from human feeling, for right may be defined psychologically as a claim whose infringement is met with a resentment deeper than the injury would justify, a resentment that may amount to a passion for which men will risk life and property as they would never do for an expediency. Rights cannot be based on psychology: but no theory which cannot explain the attendant psychological phenomena of the history of rights is worth the paper it is written on.

The truth is that the sense of right is a claim which one makes never for himself alone but for all situated as he is, a claim, then,

for which he may expect the support of others of his class and of the addressee himself. The appeal is to a certain sense of the meaning or destiny of personal existence. The substance of the claim is that "This is the way in which human individuals normally develop; and the rights I claim are conditions requisite to that growth." And no society can be interested in denying these claims, since its whole being and its future must be derived from the growing points of personality.

The ultimate basis of legal right, then, is the conception of the *normal conditions of personal growth as necessary conditions for any social welfare*.<sup>4</sup> The assumption of equality is justified, so far as it is justified at all, by the fact that the individuals in any society are not static but changing, and that, whatever their present status, their possibilities have a greater similarity than these present facts. If these probable similarities can be excluded, the assumption of equality must be replaced by one which more nearly approximates the truth. But in any case rights are conditioned upon the evidences of an intention to *become* what the normal individual can be, among which evidences the most tangible are seen in his respect for similar rights in others. With these amendments individualism loses its menace to social unity and security, and legal right need not disavow its ethical background in order to lose itself in the sterilities of positive theory or in the guideless vagueness of an all-promising and nothing-performing pragmatism.

#### CONCLUSIONS

1. There is an element of truth in the theory of natural right; namely, that there is at least one general principle of value that holds for every human society, and which governs the basic legal postulates of every system that becomes aware of it. The mode of expressing this principle is a variable; but its substance

is the *value of valuers*. There is one thing in any society that is worth more than the goods which that society possesses; namely, the capacity of appreciating those goods, a capacity that resides only in individual persons. Of the two ways of destroying values, that of destroying the goods and that of destroying the persons who care for the goods, the latter is the more deadly, inasmuch as persons can make more goods but goods cannot make more persons. And of the two ways of enhancing values, that of increasing the goods and that of developing the persons who care for the goods, the latter is the more vital, inasmuch as the improved persons can increase as well as improve the goods, but the increased goods cannot improve the persons. The same holds for different levels of appreciation; hence society has a primary concern in maintaining the conditions of growth in personal capacity.

Critics of "natural right" have assumed too readily that natural rights must be plural and that the diversities of opinion about them disprove their position as deliverances of reason. The dogmatisms of the subjective opinion of individual judges and commentators are no inherent characteristics of this view; for what is natural, in the sense of reasonable, may well be the last thing in human history to get a perfect formulation, though in the meantime all laws have been governed by its groping influence. This leads at once to the second point.

2. There is an element of truth also in the historical theory of right; namely, in what we called its second form.

The idea of ethical right is always present in lawmaking, and when it is finally unveiled it can be seen as having been present from the first. It comes to light only by degrees, and the history of law is the record of its slow emergence to explicit consciousness. Just as in the history of mathematics there was much empirical use of geometrical truth before geometry was demon-

strated, so in the history of law there must be much empirical and crude embodiment of principle before principle can be abstracted and established. The *a priori* is, in point of time, the last truth we discover. Hence it is true, as the historical school maintains, that law is to be found, not made, and found in the history of legal thought and action. But it is not true that this method is of any use to one who has not that principle in hand as a present insight and means of interpreting the past. When an unenlightened mind tries to find truth in history, he finds only the reflection of his own blindness. Hence, the historical method in law is the most dangerous of all ways of thinking when taken alone, whereas it is a necessary supplement to any theory coming forward as an insight into principle.

3. Right cannot be defined as a condition of social welfare, since social welfare cannot be made up in the absence of right. Right, therefore, requires an independent definition for purposes of a legal standard.

4. This definition is found in such conditions of personal development as are capable of conventional control. Law has to harmonize interests; but it has *so* to harmonize them that these conditions are observed. In this way the ethical standard exercises a *formative* influence on law.

Actual law involves a working adjustment of many different factors and interests. The pragmatic theories, based on general equilibria of value-pushes-and-pulls, have, therefore, a *prima facie* validity. And so far as the actual content or subject matter of law is concerned, the realistic word "adjustment" gives a rough account of it. But immersion in the multitude of competing demands breeds another demand, a demand for the weighting of interests and for rescue from confusion. Pragmatism, social or otherwise, is a rule of thumb, not a principle; and when it sets up as a principle, its outcome is theoretical despair and a some-

of-this-some-of-that eclecticism. The formative theory of the bearing of ethical principle on law does justice to the "variable content" while providing an escape from the morass of a merely adjustive value theory.

5. The formative influence of ethical standards on law is a minimal influence: it is that influence which a careful analysis of the phenomena of law compels us to acknowledge. But it is not the only way in which ethics affects lawmaking; it has also a substantive influence.

The concrete goods, which are the materials of adjustment, are themselves subject to ethical estimation. There are goods which "ought to be sought"; and there are actual interests which ought to be throttled. Our discussion has been making the usual assumption of the pragmatic theorist that any interest may become the stuff of a right merely by virtue of its psychological existence. Yet civilization is as much a molding of interests through law as it is an adjustment of interests taken as they come—a principle which Rousseau in his chapter on the legislator very accurately stated. And when we observe that every factual interest becomes a subject of moral evaluation, the realistic methods in legal theory show themselves at once completely powerless.

But this further phase of the subject requires a separate investigation. We are here attempting no more than to put beyond question the minimal ethical factor, *i.e.*, the formative factor, in the structure of a legal right.

#### NOTES

<sup>1</sup> For example, see MacIver, *SOCIETY, ITS STRUCTURE AND CHANGES* (1931) 250 *passim*; Kornfeld, *SOZIALE MÄCHTVERHÄLTNISSE* (1911) 16.

<sup>2</sup> Pollock, *FIRST BOOK OF JURISPRUDENCE* (4th ed. 1918) 46 ff. Vinogradoff, *COMMON SENSE IN LAW* (1914) 56-60.

<sup>3</sup> Pound, *LAW AND MORALS* (2d ed. 1926) 84 ff.

<sup>4</sup> See Hocking, *LAW AND RIGHTS* (1926) 68-84.

## A CRITICAL SKETCH OF LEGAL PHILOSOPHY IN AMERICA

MORRIS R. COHEN

**T**HOUGH American experience in lawmaking (and law-breaking) has been extraordinarily rich in novelty and diversity, our contributions to legal philosophy have been impressive neither in quality nor in quantity. Wealth of practical experience does not always bring about great achievements in the field of thought. Still, if we take the term philosophy of law not in its technical but in its wider sense, as general reflection on the nature of legal institutions, it has not been completely absent here, though it came near its nadir in the nineteenth century. Such reflection was in fact provoked by the Revolution, and later stimulated by controversies on the nature of the Constitution in its relation to the states and the Union. Also, as a nation we have had an unprecedentedly large diversity not only in the legislation of the different states, but also in the interpretations of the "common law"; and in a few states elements of the (Roman) civil law have entered. The problem of codifying the enormous and growing mass of this judge-made law aroused a good deal of discussion in the middle of the nineteenth century, and the topic is now revived in the present attempt by the American Law Institute at a Restatement of the Law. In recent times, prohibition has provided a new and emphatic illustration of the difference between law that is formally enacted and law that is actually enforced, and has brought back the issue of natural rights as limits not only of legislative power but also of the people's right to amend the Constitution. Indeed, since Theodore Roosevelt, in his message to Congress in 1908, stated bluntly that our unsatisfactory judicial decisions have resulted from the antiquated philosophy held by

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our judges, leaders of the American bar have entered on a campaign of "education" to convince the people of the theory that the decisions of the courts are completely predetermined by the law and that judges have nothing to do with making or changing it. Though the agitation for the recall of judges or judicial decisions subsided after triumphing in a few states, we still have wide dissatisfaction with the power of our courts to declare legislation unconstitutional. Granting, therefore, that we do not have many works expressly devoted to juristic philosophy, we may still trace the history of the general ideas about the nature of law which have dominated American thought.

#### THE CLASSIC TRADITION

A follower of Auguste Comte could probably find no better illustration of his law of the three stages than the development of legal thought in America. The latter, he might contend, began in Puritan theology, passed on through the eighteenth-century metaphysical stage of natural rights, and is now entering upon the positive stage of realistic jurisprudence. Like other sweeping generalizations, this is more suggestive for purposes of analysis than accurate as a historic description. While a theocracy did prevail in Massachusetts up to the end of the seventeenth century, this can hardly be said to have been the case in Virginia, New York, and other Colonies. Moreover, what is generally regarded as the Puritan tradition, *viz.*, excessive interference with personal conduct, as reflected in our Sunday, liquor, and other blue laws, is to this day indicative rather of the rural attitude, and characterized Catholic Maryland and Anglican Virginia as well as Pennsylvania and the Carolinas. It is tempting to trace our traditional distrust of legislatures and of human nature in public office to the Calvinistic belief in the total depravity of the human flesh. But the most extreme proponents of this political pessimism are



also most optimistic concerning the outcome of human nature in the "free" economic arena.

In any case, it is true that as soon as the Colonies developed extensive commercial relations, lawyers began to take the leading role in formulating our political and legal ideas, and, naturally, they followed the English tradition current in their day. In the period following the Revolution, the intellectual leaders of the bar, men like James Wilson, John Adams, and James Madison, were also acquainted directly or indirectly with such Continental writers on law as Grotius, Pufendorf, Montesquieu, Mably, Vattel, Bynkershoek, Beccaria, Domat, and Pothier. But the main body of our legal thought took its departure from Blackstone. From the beginning his *Commentaries on the Laws of England* found a remarkably wide public in this country. It was reprinted here five years before the Declaration of Independence, and, up to the end of the nineteenth century, it was the *pièce de résistance* of whatever legal education most lawyers received before admission to the bar. Many, in fact, received little more, except acquaintance with the management of a legal office. Though the influence of Maine and historical jurisprudence cannot be ignored, the fact remains that the Blackstonian view of law, the confused compromise or conglomeration of law as eternal reason and law as the will of the supreme power in the State, still prevails. On one hand, law is supposed to be the expression of eternal or natural rights, the voice of reason, etc. On the other hand, it is also, in the last analysis, the will of the people. Coke had argued (in his opposition to King James) that law was nothing but reason, and Hobbes had replied that Coke's ruling was law not because he had more reason than a rationalist philosopher, but because the king had made him a judge. Blackstone with characteristic complacency juxtaposed the two elements without bothering to try to indicate how the rational and

imperative elements could be combined, how the absolute supremacy of Parliament could be compatible with absolute natural (individual) rights. Substitute the will of the people for the absolute power of Parliament and you have the essence of the prevalent American view.

The view of law as dictated by eternal reason took, in the seventeenth and eighteenth century, the form of a doctrine of natural rights. The idea of a paramount law of nature goes back to antiquity, and has had a continuous history from the days of Aristotle, the Stoics, Cicero, the Roman jurists, and the scholastic philosophers to our own day. The Stoics used it to mitigate the rigor of laws such as those of slavery, and medieval theologians used it against the kings and emperors who tried to interfere with the established privileges of the Church. What was novel in the modern form of it was the individualistic or contractualistic emphasis, used in the interest of free commercial enterprise, against the established privileges of kings and feudal barons, lords temporal and spiritual. It was, therefore, an especially fitting and attractive doctrine for a country characterized by a (predominantly) free-land economy where the spirit of individual adventure in exploiting the natural resources of a vast continent seemed to yield the best visible results. After the French Revolution, Europe experienced a reaction against this philosophy. This reaction came at first from the old aristocracy (Burke, De Maistre, etc.) and from the rising spirit of nationalism, and was soon reinforced by the clear revelation of the utter degradation of the lives of men, women, and children through free competition's becoming a free exploitation of the economically weaker members of society. This recognition of the evils of "free" or unregulated industrialism and commercialism came very much later in this country, partly because up to the end of the nineteenth century we remained predominantly an agricultural people, and

partly because the heavy work in our industries was largely taken over by immigrant and foreign laborers. The individualistic laissez-faire philosophy, therefore, remained regnant in this country for a longer period than anywhere else.

Another feature that tended to strengthen the conception of law as resting upon eternal natural rights was, paradoxically enough, the fluid character of our law in the face of changing conditions of life. The English common law which the colonists brought with them never fitted American conditions completely. Almost from the beginning, therefore, American courts had to exercise discretion in discarding some of it. In this fluid state of the law, courts necessarily appealed to principles of justice or of ultimate social policy, *i.e.*, to the principles that ought to prevail in the law. And that is, after all, the essence of the traditional doctrine of natural rights. Now, in the old rationalistic philosophy and in the Scotch intuitionism, which prevailed in America almost up to the end of the nineteenth century, the principles of political ethics and justice were regarded like the principles of Euclidean geometry or Newtonian mechanics—simple, self-evident, and forever unchanging. For this reason, men as different as Locke and Napoleon could believe it to be a very simple task to formulate a code of laws according to nature which would need no change and no commentary. Such a view was applied to the Constitution alike by Federalists and Democrat-Republicans, though the two parties naturally drew different implications from this assumption. The Jeffersonians wanted to limit not only the power of the national government by bills of rights but also the power of the state governments over the rural population; for experience had shown that the people, *e.g.*, of central and western Virginia, could not hope to get fair treatment from the eastern squirearchy that controlled the state government. So long as this country remained predominantly agricultural and

rather thinly settled, with large distances from the state capitols, the Jeffersonian philosophy conformed to a social reality which no dissatisfaction with eighteenth-century ideology can well ignore. On the other hand, the Federalists (and Whigs and Republicans after them), while more realistic in stretching the Constitution for nationalistic purposes, held to the classical conception of the Constitution as a fixed code in order to block popular legislation inimical to the interests of the propertied classes. It thus came to pass that the two major parts of our population clung to the view of the Constitution as expressive of eternal unchanging principles of public morality.

On the other hand, the tradition of the Declaration of Independence and our Revolution, with the background of the English struggle against the Stuart kings and of the Colonial struggle against the royal governors, strengthened the democratic tendency to regard law as naught but the will of the people, and this democratic faith was strengthened through the overthrow of the old squirearchy by the farmers of the western border and of the newer states, who were not tenants but freely owned their own land. Antiaristocratic feelings were strengthened also by the continual arrival of immigrants who had fought for liberal ideals in Europe.

The foundation and most of the superstructure of the classical American attempt to harmonize eternal natural rights and the will of the people can be found in the lectures on law delivered by James Wilson in 1790-1791. In trying to combine democratic ideas of liberty and equality with the idea of restraints on popular will by a system of checks and balances, Wilson had, indeed, been preceded by John Adams's *Thoughts on Government*, published in the very year of the Declaration of Independence. But Adams's subsequent extreme and somewhat tactless antidemocratic utterances (of which indications were already found in his

*Defence of the Constitutions of Government of the United States of America*) and his inordinately diffuse and unfortunate mode of exposition prevented his thought from becoming generally acceptable. Wilson was much better equipped. Well trained in Scotch universities, he had a fair acquaintance with European juristic literature, and as a follower of Reid he, more than any American before him or for a generation after him, seems to have been familiar with the main currents of British philosophy. This and his wide legal experience in the service of our Revolution, of the French government, and of the state of Pennsylvania helped to free his mind from provincialism. As one of the most influential men in framing the Federal Constitution he could speak with great intimacy of what it established. And with his pious and moderate temper he had a modest but disarming way of presenting his ideas. As nationalistically inclined as Marshall or any Federalist (witness his opinion in *Chisholm v. Georgia*), he was devoid of the latter's distrust of the popular will. Rejecting the theory of sovereignty propounded by Hobbes, Pufendorf, and Blackstone (*viz.*, that Law is a rule laid down by a superior), Wilson went as far as Jefferson in insisting on the great vital principle "that the supreme or sovereign power of the society resides in the citizens at large; and that therefore they always retain the right of abolishing, altering or amending their constitution, at whatever time, and in whatever manner they shall deem it expedient." Though he was one of the founders of the Bank of North America, he insisted that "property highly deserving security, is not an end but a means."

Wilson starts from the classical view of natural law as emanating from God and manifesting itself to the universal conscience of mankind in simple, eternal, and self-evident principles. Though as a good Protestant he invokes the support of special revelation through the Bible, it is the classical Ciceronian form

of the doctrine which he develops. In accordance with his intuitionism, "the first principles of morals . . . are discovered in a manner more analogous to the perceptions of sense than to the conclusions of reasoning."<sup>2</sup> These principles, however, govern the more important part but not the whole of life. Something is left to man-made law, and on this the majority expresses the general will. Laws are not commands but contracts. Where, in the interests of natural rights, the powers of legislatures are limited by written constitutions, the courts must necessarily have the power to declare certain legislation void. But Wilson recognizes that the judiciary and other branches of the government must be mutually dependent as well as independent. The limits to the sovereignty of Parliament or of any other legislature are to be found not only in natural rights but in the division of legislative chambers and the existence of common or customary law. He shares the general fear of turning over our rights to other human beings, but recognizes that it is in fact inevitable, as, for instance, in a jury trial. Our safety consists in relying on generally or popularly accepted rules.

Wilson succeeded in expressing what became the classic American view on the nature of law and its role in the human scene against its cosmic background. But his own prestige declined rapidly when, in the bitter political fight after the election of 1800, neither Federalists nor Democrats could find complete satisfaction in his writings. He had no successors. Down to the period of our Civil War, philosophy was at an unusually low ebb in this country. The so-called common sense or Scotch intuitionism, of which Wilson was an adherent, developed into hardly more than a turgid exposition of sectarian theologic doctrines and dogmas concerning personal morals. The academic German philosophy which replaced it at the end of the nineteenth century devoted itself almost entirely to points in the theory of knowl-

edge, and showed little interest in the underlying principles of man's legal experience. On the other hand, the legal profession became more absorbed in practical affairs and less interested in theoretic or philosophic issues. The American public came to regard the practice of law as a business and was jealous of any attempt to exclude people, by scholastic prescriptions, from earning a living. The vast majority of our lawyers came to the bar through the apprentice method, and with very few exceptions our law schools up to recently were hardly better than trade schools. In the absence of real university traditions, their connections with our colleges were administrative and financial rather than educational. We must remember that even in England the training of lawyers was carried on in the professional Inns of Court rather than in connection with the arts and sciences taught in the universities. In addition, the separation of barristers from solicitors, which fosters certain intellectual standards in the former, was abandoned here. It was, therefore, rare indeed to find a lawyer like Holmes with an interest in, and genius for, juristic philosophy. This does not deny that some of our keenest minds went into the legal profession or that our courts have shown great acuteness and ingenuity in adapting the law to actual but temporary and local conditions. But there can be no great or vital contribution to any field of general thought without free and sustained reflection, and, for the latter, conditions in America were not favorable. The situation has changed markedly in the life of the present generation through the expansion of our universities and the development of law teaching as an independent profession. The legal profession as a whole, however, still proudly professes to despise theorists and doctrinaires, and for that very reason still naïvely clings to the old legal theories that prevailed in Europe before the French Revolution.

When, in the latter part of the nineteenth century, American students of history and political science began in larger numbers to go to Europe and to establish closer contact with its thought and scholarship, the doctrine of the social contract naturally fell into disrepute even here, where people had actually seen commonwealths established and their laws framed by general agreement. It is well to note, however, that as late as 1874 the United States Supreme Court still spoke<sup>3</sup> of "implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D." Apparently this mode of thought and speech was so ingrained in the American tradition that the justices of our Supreme Court could not see that our divorce statutes did exactly that on a wholesale scale, and that acts of Parliament and of our state legislatures had done it in individual cases. Nor has there since been any general recognition of the fact that another principle of natural law invoked in that and other cases, *viz.*, that property may not be taken from A and given to B, is consistently disregarded by all government subsidies, protective tariffs, and pension or bonus laws in which the funds are raised by taxing others than the beneficiaries.

After phrases about the social compact became obsolete and judges gave up the claim of being authorized to set aside statutes that conflicted with their opinion of what constitutes natural right, our courts nevertheless continued in fact to exercise this claim, first under the guise of enforcing on the legislature the "inherent limitations of free government," and later by stretching the terms "property," "liberty," "due process," and "equal



protection of the laws" in our constitutions, so that Judge Andrews could well say:<sup>4</sup>

"... under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights by legislation which will not fall within the express or implied prohibition and restraints of the Constitution, and it is unnecessary to seek for principles outside of the Constitution, under which such legislation may be condemned. . . ."

Other countries have adopted written constitutions which are political documents setting up a plan or framework of government. What is characteristically American is the notion of limiting the powers of the legislature, and leaving it to the judiciary to determine whether any statute goes beyond such powers. Ideologically, this rests on the old eighteenth-century rationalistic view that we know certain self-evident principles concerning the just powers of government, from which the decision of every case can be rigidly deduced, just as propositions of geometry are deduced from Euclidean axioms. This view is logically necessary to justify the claim that our judges have no part in creating our constitutional law, but only declare the solemn will of the people who adopted the Constitution.

The currents of thought in modern logic as well as in history and political science have turned against this classical doctrine.

In view of the limitations of human knowledge, of our imperfect knowledge of the future, we cannot logically suppose that all the subtle distinctions which make up our present constitutional law were actually in the minds of the people in 1789 or when, after the Civil War, they adopted the Fourteenth Amendment. The people could not have intended to prohibit the specific legislative regulation of affairs of which they could not have had any idea. As conditions change, the law must be changed, and the

judiciary will necessarily play a part in this change. But the pretension that what they declare is only the preëxisting will of the people or is logically necessitated by the language of the Constitution is too absurd to deserve serious attention. It is a fiction and not a truth. In fact, no one pretends that our system of government today is precisely what those who framed or adopted our Constitution really intended or anticipated. Not only have our electoral system and the relation of the president to the voters been radically changed, but there have been all sorts of shifting of power between the states and the federal government and between the executive and the legislature. Our Constitution is rigid only if the judges choose to make it so and if the people are satisfied with the results. Actually, this rigidity has been balanced by remarkably flexible methods of interpretation whereby entirely unexpected meanings have been found in the terms of our Bill of Rights. Thus the term "property" has been stretched to include the freedom or the right to contract, and to prevent legislative regulations of such contracts in behalf of such public interests as the preservation of the standard of living.

The notion of a government of limited power—certain rights being reserved to the people—is undoubtedly derived from the notion of a social contract in which people give up to the government some of their rights and reserve others as inalienable. But historians now insist that such social contract is a pure fiction and that men in a state of nature without government would be like beasts and have no rights—certainly no real liberty or power to do what they wanted. It is only through social rules and regulations that real freedom can be achieved, as can be seen in our traffic rules. More recently, some students of political theory have come to recognize that the essence of the theory of natural rights is not the historical existence of a state of nature but rather the appeal to an ideal to which the law should conform. Certainly,

unless we are prepared to deny that legislation can ever be unjust and oppressive, some appeal from it to natural law, political or public morality, or the principles of sound social policy and public welfare—call it what you will—is unavoidable. But this is an appeal in the moral forum, and in other countries it takes the form of a solemn declaration addressed to the conscience of the legislature and of the people at large. The courts' function is limited to the enforcement of the enacted law. It has been characteristic of the American system to confuse the legal and the moral and, in effect, to make the judges' view of public morality the law of the land. Not only Democrats like Jefferson but Federalists like James Wilson, living at a time when the Revolutionary tradition was vivid, found it easy to think that the people had a right to disregard the law when it seemed to them unjust or contrary to conscience. The development of our constitutional law has changed this moral right of the people into a legal right of the judiciary. From the anarchy that would follow if every individual felt free to disobey what seemed to him an unjust law, we have been saved by a doctrine of judicial absolutism or infallibility: whatever a majority of the Supreme Court decides not only is the law but is also the original intention of the people, and conforms to the eternal principles of justice, or at any rate to the principles recognized by Anglo-Saxons since they roamed in the German forests.

The attitude of more recent political writers is not that we should not apply principles of justice to the law, but rather that judges are not the most competent to do so because the judiciary is not properly constituted to institute investigations to ascertain the actual social facts of contemporary life. In a homogeneous and stable society, courts may be relied on to take judicial notice of the prevailing morality. But living as we do in a most heterogeneous society, spread over the whole continent and undergoing

very rapid changes, the work of judges in putting their view of justice or the rights of men above that of the legislature has in fact made very arbitrary opinions the law of the land, thus impairing that certainty and definiteness which are claimed to be the requisite characteristics of justice administered according to law. Even the most orthodox defenders of our established system have to admit that there is no certain way of determining whether a law is constitutional or not before the courts have actually ruled. And the only guide thereto is our knowledge of the personal inclinations of the judges.

The practical workings of this tradition in the law answered, on the whole, the needs of our free-land economy which prevailed to the end of the nineteenth century. It led to the abolition of entailed estates and to the greater freedom of testamentary disposition. Commercial ideas favored more liberal bankruptcy laws to encourage enterprise by taking away the Damocles sword of the old-fashioned imprisonment for debt. The need for laborers to develop the land and natural resources made for free immigration, religious tolerance, and liberal suffrage laws. The relative scarcity of women in the Western states made for woman suffrage—though in the early part of the nineteenth century the American courts were exceedingly backward in recognizing the separate property rights of married women. Possibly the untrained character of most members of the bar helped the early abolition of the old technical forms of action and helped to enact the laws that allowed amended pleadings. America also took the lead in allowing those charged with felony the right to be represented by counsel and to appeal. Somewhat similar motives may have led American courts to give greater freedom to the jury and to limit the power of the judge. The supernaturalistic fear of perjury, which had led to the absolute exclusion from the witness chair of interested parties, was softened by the demands of justice

and humanity into more generous rules about the admissibility of testimony, with extension of the privilege not to be compelled to answer certain questions. Indeed, the Fourth and Fifth Amendments to the Constitution at one time threatened to serve as an "immunity bath" for all corporate wrongdoers. But there can be no doubt that the original intention was in the interest of humanity against torture. In the international field, America has contributed the recognition of the right of expatriation.

On the whole, the American legal tradition in our courts has been dominated by regard for "individual" property and freedom of enterprise as well as by certain traditional morals. It has not been so zealous for the interests of family continuity and has had little regard for the laborer who is at the mercy of superior economic forces. A money economy naturally tends to identify virtue with monetary success, so that it is only the exceptional poor who are worthy or honest, and this view is strengthened when the economically weaker members are largely foreign born.

In the light of the foregoing sketch of the dominant ideas around which our legal thought has moved, we can see the position of men like Marshall, Kent, Story, Cooley, and those who have followed them.

There can be no question about Marshall's great service in giving the Constitution an interpretation that enabled the federal government to serve our national interests. In this respect, however, it is well to remember that his archopponent, Thomas Jefferson, when faced with the facts necessitating the Louisiana Purchase, equally served national interests, despite his theories of strict construction of the Constitution. Indeed, on the question of protecting American commerce against England, Jefferson and Madison were even more nationalistic. Marshall was a great politician. He combined the gifts of a persuasive personality and

seductively convincing utterance with a marked shrewdness concerning what was feasible under the circumstances. Thus he was willing to forego the supremacy of the Supreme Court in constitutional interpretation when it looked for a while as if the power of impeachment might become an effective weapon of the legislature against the judiciary.<sup>5</sup> He was not, however, either widely informed or a great original thinker. When he was not following such models as *The Federalist* or did not have the aid of counsel at the bar, his writings—witness his *Life of Washington*—lacked real intellectual distinction. When today we examine his naïve reliance on very questionable principles<sup>6</sup> as if they were self-evident, we cannot rank his contributions to legal science as highly as was the fashion till recently. The doctrine of the judicial power over unconstitutional legislation was, of course, not his invention. From a strictly intellectual point of view his arguments in *Marbury v. Madison* were effectually refuted by Gibson of Pennsylvania.<sup>7</sup> President Jackson also disposed of Marshall's argument that the judges swear to obey the Constitution, by pointing out that members of Congress and the executive also swear to obey the Constitution and must therefore follow their own conscience regarding what the Constitution means. From time immemorial it has been recognized that the interpretation of law cannot be restricted to the judiciary, but must necessarily be exercised also by the executive and the legislature. Indeed, our own Supreme Court has since recognized that what the Constitution means by "a republican form of government" must be determined not by the courts, but by Congress and the executive. The historic fact that the American people have grown accustomed to allowing the interpretation of the Constitution by the judiciary to prevail has been due not to Marshall's very questionable arguments but to the fact that a government of three *independent* departments according to the classical theory would

inevitably fail to function; and it is only by some process of mutual deference and compromise, or by the extralegal method of a political party controlling all three, that effective government has been made possible.

It is often claimed that Marshall rendered a great service to the development of our country by his *Dartmouth College* decision; that this decision made franchises and corporations more secure and thereby facilitated the flow of funds for the development of industry and commerce. This is at best a debatable issue. It may well be contended that our overdeveloped corporation has become a Frankenstein monster, and that a slower development in this respect might have been much more favorable to our general welfare—might have led to a less hurried and wasteful exploitation of our natural resources and not stimulated such unprecedented corruption of our franchise-granting bodies. But be that as it may, one cannot read the opinion of Chief Justice Richardson of the New Hampshire court in the *Dartmouth College* case without feeling that it was legally a much sounder view, more in accordance with the general principles of the power of States and with the proper distinction between a public charter and a private contract. The undue extension of the notion of contract to government relations, begun by Marshall, has in fact worked havoc in American jurisprudence. Instead of making legal transactions secure, it has, actually, made them most insecure because no one can tell how far the courts will go in limiting the power of the government.

Marshall also rendered some vigorous and sound opinions in matters of international law. His essential limitations, however, his narrow sympathies, and the absence of a sense of the really larger issues can be seen in his opposition to the right of expatriation—a view that, if strictly adhered to, would certainly have hindered the free development of this country. In this respect he certainly failed to appreciate the wisdom of James Wilson.

Nor has time served to enhance the great reputation of our three classic legal writers of the nineteenth century—Kent, Story, and T. M. Cooley. Kent had an undoubtedly vigorous mind and a rather wider legal learning than was prevalent in his day. He made some notable decisions as an equity chancellor. But in his general legal views he never got beyond Blackstone; and his antidemocratic views made him devoid of sympathy for, and understanding of, many actual developments of American law. Story also possessed a good deal of miscellaneous learning which he used to support Marshall and to enhance the prestige of the English common law. But he was a voluminous rather than a penetrating writer or clear thinker. His great, outstanding contributions in the field of conflict of laws no one can deny, but his conception of general jurisprudence was a confusion that has plagued American law. And while he rendered some important decisions in admiralty, some of them showed astounding intellectual confusion. He created a tradition of legal scholarship at the Harvard Law School, which resulted in useful voluminous treatises by Washburn, Parsons, Greenleaf, and others. But the scholarship was narrowly technical along the old beaten paths and made no contribution to our store of general ideas.

Cooley's great achievement in legal theory was to have reformulated the doctrine of the inherent limitation of legislative power, without explicit recourse to the senescent doctrine of natural rights or the social contract. The Civil War had weakened the powers of the states and the Democratic influence on the Supreme Court which had come with Chief Justice Taney. The country was, therefore, ripe for a new extension of nationalism at the expense of the states, and Cooley's work was essentially directed to the limitation of the powers of state legislatures, even in matters of taxation. The Republican party, as the union of western farmers and eastern manufacturers, was a nationalist party interested in tariffs, transcontinental railroads, industrial



development, and the like. And the Fourteenth Amendment to the Federal Constitution, by subordinating the legislation of the various states to the veto power of the federal courts, was a great step in the direction of nationalism. It also tended to take the ultimate decision of social-economic issues out of the political into the legal forum, where property interests could be better represented and protected. It is interesting in this connection to note that Cooley became the first chairman of the Interstate Commerce Commission—a commission that opened the door for joining executive and judicial functions, in flat contradiction to the professed doctrine of the separation of powers as the condition of liberty.

It may be, at first, somewhat surprising that Bentham exercised so little direct influence on the legal thought of this country—that most of his ideas came to us rather through Austin. But it must be remembered that he wrote at a time when revolutionary ideology and the phraseology of natural rights were in the ascendant in this country. Moreover, the specific evils against which Bentham fought, for example, remnants of feudalism, were not serious matters in our economy, and the commercial interests in this country did not then need his support as they did in England. Similar reasons will explain the later influence of the conservative, Henry Sumner Maine, and, indirectly, of the German historical school; for the former gave a new and positive sanction to the doctrine of *laissez faire* and contractualism, and the latter strengthened the prejudice against codification or attempt to change or reform the law by popularly elected legislatures.

The writer who first showed the marked influence of this historical school of jurisprudence was Pomeroy. The fusion—an ungenerous critic might say the confusion—of ethical and historical considerations in the law is perhaps best illustrated in his

work *An Introduction to Municipal Law*. He defines law as the body of rules by which the supreme power in a State is guided in its governing actions. From this it logically follows that there may be laws that are unjust. Indeed, Pomeroy explicitly recognizes that rules interfering with natural rights may still be positive laws. But the clear distinction between what is in fact law and what on ethical grounds we think ought to be the law is not a pleasant one to face. And so Pomeroy, like others before and after him, tries to identify the actual with the ethical by means of the dubious historical generalization that, as nations develop, laws become more ethical and are imbued more and more with those "innate principles of natural justice common to all times and peoples which the Romans called *Jus Gentium*."<sup>8</sup>

In line with the general attitude of the historical school, Pomeroy opposed the adoption of a code and regarded that as equivalent to abolishing our traditional system of jurisprudence. In insisting that the present system is more elastic, he glides over the implication that the judges must engage in the process of supplementary legislation in order to enable them to meet new situations in a progressive society. Pomeroy, however, seems to have had too much good sense not to recognize the advantages of codifying the criminal law and also parts of the law of political conduct, where the need of clarity and certainty is supreme. Against the fashionable indulgence in panegyrics on *written* constitutions, he pointed out that some of our constitutions contain a good deal of evil. He also expressly recognized that rigid constitutions are unworkable in times of crisis and tend to disappear in the mass of judicial interpretations. He regarded our disastrous Civil War as the "inevitable consequences of an organic law, rigid and inflexible . . . framed for one generation and so quickly outgrown by the progress of ideas in another."<sup>9</sup>

Complete nationalism, however, was still foreign to America,

and Pomeroy recognizes that a large part of the law cannot be national, since reason and justice are not restrained by the boundaries of different lands or the divisions of different races. In opposition to those who would put the common law beyond all legislative changes, he contends that it is not a complete system, "existing partly in actual precepts, and partly in an undefined or cloudy state, ready to have the curtain rolled back and the law discovered by judicial action. . . it is, rather, a power continually reproducing itself, taking up fresh material and converting it into new regulations, new maxims, new applications, in short, a new code."<sup>10</sup> "Religion, philosophy, letters, arts, trade, commerce, government and above all, the ethnic life of a people enter into and shape their Law."<sup>11</sup> A detailed analysis, however, of how this actually takes place, and of the relative weight of different elements of society in the final determination, or making of the law, was not forthcoming from this school of legal thought.

A later but more uncompromising representative of the philosophy of the German historical school was J. C. Carter, who opposed the introduction of the Field Code for reasons somewhat similar to that which led Savigny to oppose a German code, *viz.*, that law must grow and cannot be made. Carter, however, did not have Savigny's learning or philosophic outlook. He, therefore, quite naïvely took the view that law is nothing but custom, and that judges are simply experts on the various customs that they enforce. His book is a remarkable example of the limitations of a great lawyer and an earnest, devout soul seeking to come to grips with the fundamental questions on the nature of law. Carter left a large legacy to Harvard University for a chair in the Law School, piously hoping that the occupant would continue his views, but he was liberal and generous enough not to restrict the University in any way. It is a tribute to this liberality and to the enlightenment of Harvard

University that the first man to occupy that chair was Roscoe Pound, a pioneer in the effort to show that legislation may be a legitimate source of legal principles.

Pollock in his inaugural lecture<sup>12</sup> remarks on the absence of positive and analytic method in American works on the general theory of jurisprudence. "Their theoretic work is mostly akin to that of the German philosophical and historical schools." Yet even before these remarks were made there was growing up at Harvard University a vigorous school of positive and analytic jurisprudence led by Dean Langdell, whose Christian name, Christopher Columbus, some regarded as prophetic of his achievement.

#### LANGDELL AND HIS SCHOOL

The great prestige that the case method of law teaching has achieved—in large part due to the ease with which it can be employed—has not been conducive to a right appreciation of Langdell's views on the nature of law or to a just estimate of his position in American legal thought. The widespread notion that by the case system he introduced scientific method into legal studies is based on the prevalent ignorance of the history both of law and of science. The case system was in vogue in the Inns of Courts centuries ago. Indeed, it was a lawyer, Francis Bacon, who was so carried away by it that he arrived at the fantastic idea that it was *the* proper method for making scientific discoveries, and that by means of it he could soon build up all the sciences. This was made plausible by the traditional Neoplatonic notion that nature was constructed on the basis of a few simple forms, so that by the observation of a limited number of instances all of these forms could soon be brought to light. Similarly did Langdell believe that a few principles were at the basis of all law, and that it did not require the analysis of very many cases to get at these

fixed or invariant principles which no human agency such as courts or legislatures could change. Few men ever showed so much concentration and keenness in trying to reduce the whole law to a few simple principles. He was thus a vigorously traditional rationalist. And while he ignored the political theory of sovereignty, neither he nor any of his followers went beyond the Austinian system of legal categories.

Though Langdell paid some attention to legal history, *e.g.*, that of equity pleading, neither he nor his immediate followers had Austin's familiarity with the substance and form of Roman law and with its modern institutional writers. Hence they tended to conceive of the "common law" as it existed in England at the end of the eighteenth century as the perfect embodiment of a completely rational legal system. Unsympathetic critics suggested that this was a defense for teaching diverse students what was not the actual law in any of their native states. The reply which Ames and other followers of Langdell made was that the object of a law school was not to teach the substance of the law that prevailed in any one jurisdiction but the method of legal thought. But this distinction is not as clear as it sounds, because Langdell and his followers failed to indicate the precise relation between the logical and the historical elements in legal systems. They could not, therefore, separate legal method from the historical substance of the law. The common law is, after all, not a purely timeless logical system but merely a body of rules that historically grew up under definite social conditions in England. Why, therefore, should not the laws of New York, New Jersey, Pennsylvania, Wisconsin, Texas, or Louisiana, and their variations, be entitled to similar historical and systematic study? To restrict the student to the conventional common law of England as if it had become an eternal, unchanging pattern can, therefore, be defended only on the ground of

pedagogic economy rather than of scientific adequacy. Moreover, it may well be urged that the Harvard school has envisaged legal history as a chronicle of judicial decisions with some reference to their logical connection rather than as a branch of social history. Roscoe Pound later defended this conception of legal history on the ground that the greatest single factor in molding any judicial decision is the logical force of the best available analogy that counsel suggests. But though this may be true if we take a short-span view of time and substance, taken over a longer time and range of interests the history of law needs a knowledge of social and economic as well as of political conditions to make it fully intelligible. This does not, of course, deny the value of the contributions to legal history made in such articles as those of Ames on the history of assumpsit or in Thayer's illuminating remarks on the history of the law of evidence. But it indicates a limitation in the conception of law and of the influences which modify it.

The neglect of the social-economic factors that actually mold legal as well as other institutions naturally went together with the tendency to elevate into the rank of fixed principles legal rules that are by no means universally valid but can be more appropriately explained by reference to specific historical conditions. Thus Langdell argues that it is "impossible" for creditors' rights to survive the death of the debtor, but admits that legislation sometimes "interposes" to bring about this impossibility—an impossibility which is alleged to be as old as the law. Similarly does Ames explain why certain claims (choses in action) cannot be transferred, on the ground that personal relations, in the very nature of things, cannot be assigned. He himself, however, goes on to show how this is actually done by various devices and by the fiction of "the obligor's consent given in advance." Clearly the "impossibility" in such cases follows from a dogmatic assumption which may be very useful in building up a teachable doc-

trine, but which does not correspond to the full historical actualities. Among the Romans such a personal relation as that of the wife's or son's duties to the husband or father could be transferred to others by sale, but this could not be done with ordinary debts, for the latter involved danger to the life of the debtor. The question which personal claims can be transferred and which cannot be thus depends upon historical conditions. The inherent inalienability of "personal claims" is thus not an eternal principle but a dogmatic fiction, a useful device for building up a serviceable account of the law, but sheer error when set up as something "as old as the law," "a rule of universal law," or "a working principle for the determination of controversies for all time."<sup>3</sup>

Professor Williston elaborated and applied Langdell's idea of contracts into what is, from the analytic point of view, the classic treatment of the subject today. The traditional idea of the meeting of minds, or of an expression justifying such an interpretation, and the classic conception of consideration, here received their definitive form by the aid of very ingenious technical refinements. Williston's work must command respect from all those who value coherence and thoroughness; but it is meeting with an ever increasing volume of discontent from those who wish to understand how the law actually works and what social realities determine its development. Professor Williston has also made substantial contributions to the law of sales and negotiable instruments, in which he shows himself shrewdly appreciative of practical convenience in commercial transactions but hardly in a mood to question the adequacy of traditional ideas.

Langdell's point of view is still best represented by Professor Beale, to whom the law is a system of fixed legal concepts, so that a judicial decision is correct or incorrect according to whether it does or does not conform to them. Professor Beale has worked in many fields with admirable intellectual tenacity. His main field,

however, has been that of the conflict of laws (private international law) for which the wealth of American experience with forty-nine different jurisdictions offers rich material. The newer so-called realistic writers on jurisprudence frequently call him a legal fundamentalist. It is characteristic of the present American temper that this is not generally regarded as having a eulogistic connotation.

Associated with Langdell, but somewhat independent of him, is the work of Thayer in the fields of constitutional law and of the law of evidence. In the former field Thayer was one of the first legal scholars to approach the matter without the rhetorical ceremonies that Story had made fashionable. Thayer attributed the origin of the power of our courts to declare statutes unconstitutional to the fact that the King's Privy Council declared some legislative acts beyond the powers granted in the colonial charters. But he did not give any evidence that our own colonial judges ever did so, and it is unthinkable that our post-Revolutionary judges would have dared to follow the practice of the hated King's Privy Council if it were not that the prevalent doctrine of natural rights and of a social compact supported the idea of a government of enumerated powers.

Thayer was more fortunate in his contribution to the theory of the law of evidence. Here he had the advantage of building on the work of Brunner. He analyzed the ideas of rationality and evidence in the English common law, and introduced order in what had been an arid labyrinth of technical rules. His analysis of the nature of presumptions and other fictions in the law of evidence showed a real grasp of realities behind ceremonial expressions.

Thayer sketched his views of the history and nature of the law of evidence in his *Preliminary Treatise on Evidence at the Common Law*. He did not live to do any more, but his ideas were



adopted and elaborated with acumen and extraordinary industry by J. H. Wigmore, whose treatise on evidence represents the high-water mark of analytic jurisprudence. It will probably be a long time before any one produces a legal treatise of such dimension and competence. Wigmore shows a catholic spirit and an acquaintance with varied sources of culture. His hardheadedness in refusing to accept on faith the deliverances even of psychologists such as Münsterberg on the nature of testimony has become classic.

The newer tendency among the younger teachers of law today is to pay somewhat more attention to newer psychologic movements and to question the soundness and adequacy of traditional rules about hearsay testimony and the like. Professors Jerome Michael and Mortimer Adler are endeavoring to introduce modern logistical methods into the law of evidence.

Langdell and his followers, especially Dean Ames, laid a broad foundation for legal scholarship in this country not only by their insistence on examining all the cases but by making law teaching a dignified profession and by training a group of scholars to regard the study of law as a worthy field of human interest apart from its aid to successful practice. Ames devoted all of his life to law study and law teaching, and he did this with a nobility that won the veneration of his pupils, who later became our leading practitioners, so that he who had never practised law was shortly before his death considered for the presidency of the American Bar Association—a remarkable achievement when we remember the great prejudice of the practical lawyer against the theoretical teacher. But the Langdell school as a whole did not make any substantial contribution to the growing movement for social legislation such as was represented by Workmen's Compensation Acts. And while its members did not go as far as President Eliot in regarding the scab or strikebreaker as a hero,

they did cling to the old laissez-faire notions in the law of torts. Today the most significant effect of its lack of any coherent philosophy is shown by its influence in the restatement of the law. The doctrine of *stare decisis* and the empiricist living from hand to mouth that is called "deciding each case on its merits" (without any guide on how to evaluate these merits) have made our actual law a hopeless labyrinth. Clearly, there is no way out except by some process of selecting some rulings and rejecting those that conflict with them. This, however, requires conscious examination and evaluation of the policy of the law, for which there is no room in the tradition of the Langdell school. They view the law as a perfect system, even though in practice it cannot be so. How, then, can a restatement be made when in fact the laws of different states actually conflict and it is not always clear how to reconcile different rulings in any one state? Unless the restatement is backed by cogent considerations of public policy or social utility as a basis of selection, it merely adds one dogmatic statement (*i.e.*, the opinion of the writers) to those of diverse judges in different jurisdictions. There is doubtless a vast amount of agreement in the laws of the various states, but to the extent that this agreement holds, there is no problem. The difficulty arises when we ask how to choose between different rulings, and for this purpose the principle on which the restatement is made cannot be of aid.

Associated with Harvard University—but hardly followers of Langdell—were Holmes, Gray, and Pound. Holmes was by far the greatest legal historian that this country has produced and one to be counted among the foremost masters of all countries for substance and for the penetrating insight that illumines and fuses otherwise miscellaneous information. As his work has been made the starting point of the recent realistic movements in jurisprudence, I shall refer to him later. Here, however, we cannot pass

over the work of his friend, J. C. Gray, whose *Nature and Sources of the Law* is one of the first American books devoted explicitly to the theory of the law. Gray was a practising lawyer as well as a professor, and his treatises on the law of real property, *Restraints on the Alienation of Property* and *The Rule Against Perpetuities*, follow the conventional individualism as well as the traditional conception of legal history. But he had an honest and robust mind that liked to face difficulties which others evaded by smooth phrases, and he seems to have taken a proper delight in confronting legal fiction with the actualities of social life. This gives unusual value to his treatment of the general theory of the law. He showed with irresistible force that judges not merely declare what the law was before they ruled, but that their ruling actually makes law. In thus making new law, courts are limited by their material or sources, such as opinions of authorities and their own previous decisions.

Gray has been severely criticized from two different points of view. The traditionalists have urged that if the judges make the law, then there is no law before they make it, and this they regard as a *reductio ad absurdum*. The absurdity, however, is in the traditional assumption that the law is a closed system which has a determinate answer for every question that can come up, so that the judge has nothing to do but to declare what the fixed law is. If that were so, all growth or change of the legal system would be impossible. But if the law is like an organism that grows without losing all continuity with the past, then there is no reason for denying that judicial decision is one of the ways through which it is changed and made to assume the form that it actually has at any time.

Another criticism of Gray is made by the nominalists, who object to his defining the law of a country, or other organized body

of men, as composed of the rules of conduct that its courts follow and that it holds itself ready to enforce.<sup>14</sup> They argue that what a court does is only decide a given case before it, and that, so far as such a decision serves as a precedent in future cases, it is as Gray himself characterized, not law but a source of law. And, indeed, precedents are sometimes disregarded. This argument, however, ignores the actualities of the case. No case is so unusual that no other is like it. Whenever a court makes a decision it implicitly (and sometimes explicitly) decides a class of cases. The exact limits of the class may not be precisely defined, but we do not find closely similar cases constantly brought before the court; *i.e.*, lawyers recognize that the case has been decided on some abstractly relevant circumstance and the formulation of this is what we call the rule. Such rules change as the number of cases widens, but this does not deny the reality or relevance of the rules as guides for lawyers in their advice to clients or for courts in their actual decisions.

It is sometimes asserted that Gray regards laws and morals as altogether distinct. This is not accurate. What he does assert is that they are not identical, but that law in fact does and must draw freely on the moral ideas of the community and of the individual judge. Not only does moral feeling serve as a source of law when other factors fail, but it largely influences the direction and effect of other factors: "Whether a statute shall be interpreted one way or another is often determined by the moral character which the one or the other interpretation will give to it; and there are few judicial precedents or professional opinions or customs whose position as sources of Law is not strengthened or weakened by the fact of their agreeing or disagreeing with sound ethical principles."<sup>15</sup>

The real difficulty, however, is that Gray assumes that moral

ideas are uniform and therefore does not in fact raise the question of what makes judges decide on some one view of morality rather than another.

#### THE SOCIOLOGIC JURISPRUDENCE OF ROSCOE POUND

Though associated for the greater part of his professional career with Harvard University as a teacher and dean, Roscoe Pound is not entirely of the Harvard tradition. He started life as a western progressive influenced more by German jurists, such as Kohler, and by the Chicago school of sociologists, especially A. W. Small. His sociologic jurisprudence began as a determined effort to view the law as a social institution—how it actually operates in the life of men. To this task he brought not only a prodigious amount of learning in regard to the different branches of the common law, equity and their history, as well as the actual course of American legislation, but also a remarkably wide acquaintance with Roman and other systems of law and their literature. To this he added considerable familiarity with the course of the history of philosophy as viewed by Erdmann and other Neo-Hegelians. This learning was used to explain and make intelligible many dark corners of the legal world, and, in general, to enable us to see some order in the bewildering multitude of legal facts. At the very beginning of his career he preached the necessity of a philosophy of law—that unless our legal doctrines are united by some coherent system of fundamental ideas, we must continue to wander aimlessly and get nowhere.

It is easy today to forget the stimulating effect of Pound's early writings, coming at a time when philosophy of law was at a very low ebb. The present writer is glad here to acknowledge his own obligation to these writings.

1. Pound liberalized the study of law in America by his insistence on what Holmes had emphasized—that law is part of

human life and therefore subject to the same winds of doctrine and climate of opinion that prevail in our political, economic, religious, and other social views and activities; that our legal experience could be illumined if we studied other legal systems and the writings of those who had reflected upon them. One has but to glance at contemporaneous comments, expressing indignation that any one should read foreign legal writings, to appreciate the significance of this.<sup>16</sup>

2. Not only did he emphasize in general the social function of the law and its history, but he pointed out the need of distinguishing between law in books and law in action; that the former has to do for the most part with arguments before our appellate courts, while in actual life the law and justice which most people receive are meted out by justices of the peace, city magistrates, or municipal judges, and that the expense of an appeal makes it generally unavailable to most people. Among other human factors in the law he called attention to the fact that there is a sporting element in judicial procedure which is a source of entertainment to the public.

3. He sought to break down the sharp distinction between common law and legislative enactments, indicating how the former grew out of statutes such as the Statutes *quia emptores, de Donis conditionalibus*, the Statute of Frauds, etc., and that there was no reason why modern statutes should not be used as sources of legal analogies in the adjudication of cases.

4. Finally, he emphasized the importance of rendering justice in the given case before the court by appreciating the social factors that enter into it as opposed to mechanical manipulation of legal concepts. Unfortunately, however, he has not elaborated any definite ideas or methods by which such justice can be secured.

It is amazing that, despite such an equipment of ideas and

learning, and a most influential position as dean of one of our leading law schools, Pound has found so few disciples or direct followers. Part of the explanation, it seems to me, is to be found in the absence of a coherent philosophy or in a certain lack of constructive intellectual energy.<sup>17</sup>

It is not merely that Pound fails to attain a high degree of consistency—perfect consistency in human affairs is an unattainable as well as an unavoidable ideal, and a narrow consistency often shows lack of perception of diverse and opposing considerations—but that one does not gather whither in the long run he is driving or how he can fruitfully marry the ideas of Small and Dewey to those of Stammler and Kohler, Coke and Marshall. On the one hand, we have a persistent opposition to mechanical jurisprudence of concepts or fixed rules, and a devastating criticism of our courts' uncritical reliance on such principles as the freedom of contract. On the other hand there is a naïve clinging to the fiction of the division of power between the judiciary and the executive, against those who favor the fusion of judicial and administrative functions in commissions. He insists that only rules and principles interpreted by courts can stand between the citizen and official incompetence, caprice, or corruption, as if principles and rules could enforce themselves without human—all too human—judges. Courts, he insists, decide on principles. Yet no one has pointed so emphatically to the fact of judicial empiricism, that principles are empty and misleading unless we know all the relevant social facts to which they are to be applied. And how can any one doubt that our courts have less opportunity than commissions have to institute researches and factual inquiries even before disputes arise? He denounces law without rules as *cadi* justice (which ignores the fact that in a simple community, governed by custom and the Koran, the rules are well known). Yet, in insisting on the element of judicial discretion and on the presence in the law of standards, he admits elements other than

rules or principles. It is, therefore, hard to see the difference between *cadi* justice and a judge or juryman exercising his discretion. No doubt wisdom consists in avoiding easy opposite extremes, but Pound fails to indicate the *via media*. Though he insists on a balancing of interests, he does not give us any guidance on how that is to be effective.

Lovers of truth are properly jealous of the popular demand that the work of scholarship should justify itself by immediately practical applications. But it is disheartening to find so much thought, learning, and zeal for the better administration of justice leaving us so bereft of any new outlook on our legal institutions. From the whole enterprise of sociologic jurisprudence there has not come, so far as we know, a single suggestion for the modification of the traditional law-school curriculum or of our judicial system.

Though Pound recognizes that judges have a large part in making the law and that some of the results have been bad because based on an outworn individualistic philosophy, and indeed on inadequate knowledge and appreciation of the history of the law as well as of modern industrial conditions, he opposes any popular control over courts and repeats with approval Lord Coke's dictum that law is an artificial reason and that judges are answerable only to God. Why judges should be more answerable to God than are presidents and congressmen and not at all to the community in whose services they are employed we are not told. Pound seems to be aware that irresponsibility is not altogether desirable in human affairs and he tries to mitigate it by claiming that professional opinion of the bar is a sufficient check against unwise or unjust decisions. But history hardly supports this. Moreover, the opinion of the bar is class opinion, controlled largely by a few leaders who may have acquired prestige by defending the interests of wealthy clients.

It is clearly a case of what James and Dewey have called vicious



intellectualism to argue as if the presence of a good logical reason for a rule of law excludes a social or economic motive for it. In the case of the limitation of the master's liability for injuries by a fellow servant, Pound has himself shown that there were within the legal system logical analogies to the contrary. The actual result was, therefore, certainly not uninfluenced by the considerations of social, economic policy as viewed from the point of view of the possessing class—as is, indeed, unmistakably indicated in the opinions of Lord Abinger, Chief Justice Shaw, and others—which established the “fellow servant” rule.

In general one misses in Pound's later writings a realistic appreciation of human motives in the law. In arguing for the certainty of justice according to law, he ignores the sources of our actual uncertainty, such as the diversity of political and economic opinions among our judges or their different degrees of sympathy for those who are economically oppressed and whose sufferings our more sensitive and responsive legislatures try to alleviate. Nor does Pound stop to analyze the meaning of “reason” as a “standard” when he defends the transparent fiction to which courts resort when they say that they do not declare a statute unconstitutional except when it is so beyond any rational doubt. When in fact the president, a majority of the members of the House of Representatives, of the Senate, and a minority or perhaps even a majority of all the judges who have passed on the act have expressed a contrary view, one would think that a sense of humor as well as of courtesy would prevent even a majority of a court from setting up their own opinion as the only rational one.

#### THE LEGAL PHILOSOPHY OF JUSTICE HOLMES

Holmes was not only a legal historian, the author of the greatest legal classic that this country has produced, but essentially a man of a philosophic turn of mind. He did not, to be sure, have

an extensive or close familiarity with technical philosophy and did not seem to enjoy the process of building up systems of thought by long and closely articulated reasoning. But he had a genuine desire for getting at fundamentals and seeing details *sub specie aeternitatis*. He belonged to none of the traditional schools but, coming to manhood in New England when the ideas of Darwin, Spencer, and the higher critics of the Bible were shaking the foundations of the older orthodoxy, Holmes developed a unique combination of skepticism and mysticism which enabled him to formulate for himself a modernized version of Calvinism. We do not and cannot know the ultimate nature of things but we are controlled by forces bigger than ourselves and it is the part of wisdom to accept our lot and heroically strive to do our best. Accepting the old concept of destiny, he liberalizes it with the addition that effort is one of the ways through which the inevitable comes to pass. The legal philosophy that results from this is realistic in the modern sense that it is distrustful of ideas or principles that are not embodied in actual decisions of courts enforced by the power of the State. But he is also a realist in the ancient sense of recognizing the reality of ideals which mold the policy of the law. Though distrustful of mere logic chopping, he constantly preached the importance of theory, of critically examining the grounds of social policy.

In his economic and political views Justice Holmes remained personally faithful to the classical tradition of individualism and laissez faire, and this showed itself in the extreme harshness of his legal opinions in cases of tort and in his faith in economic competition as bringing to the fore the most capable directors of economic production. His extraordinarily keen intellectuality, however, made him realize the limitations of his personal knowledge of these matters. His conception of chivalry also enabled him to appreciate that the laboring people were entitled to more

consideration than his less imaginative and more traditionally minded colleagues would grant. His great dissenting opinions thus gave him a reputation for radicalism. This was not at all an accurate appreciation of his position except to the extent that radicalism may denote the position of the liberal evolutionist who recognizes that it is impossible to fix in advance for all times what governments may or may not do, and that the pretense of courts to find in the Fourteenth Amendment all the restraints on popular legislation which they have read into it is intellectually indefensible.

Though Holmes was always a gallant figure and greatly admired, he has until very recently had very little influence. His great decisions were those in dissent. No branch of American law can be said to have been molded by him. He was an intellectual aristocrat and was not disturbed by the fact that the legal profession did not take the trouble to understand him. It might also be added that his preference for pregnant, pithy utterances rather than for systematically articulated arguments did not make it easy for the neophyte to get the full bearings of this thought. His utterances came like streaks of lightning that illumined the whole scene but left us with little guidance on how to manage the vexatious details. In this respect he was the direct antithesis of his dear friend and colleague, Justice Brandeis, whose strength is almost entirely in his acute perception of the relevant economic details rather than in the fundamental principles involved.<sup>18</sup>

Still, the essential soundness of Holmes's main views on the nature of law, the thorough though unpretentious scholarship, give his work an enduring quality, so that it seems unquestionable that future students of the law will come back to his writings as to those of no other American jurist. At any rate, the latest school of American jurisprudence seems to start from one of his dicta; to wit, that the law is not a brooding omnipresence in the

sky but our prediction of what courts will decide—a dictum which some have taken too literally.

Holmes showed the keenness of his independent mind by expressing the opinion that he would not be afraid if the veto power of the federal courts over Congressional legislation were done away with. In his insistence, however, on maintaining the power of the courts to declare state laws unconstitutional, he ignores the fact that in a changing society the relations between the states and the nation are essentially political, *i.e.*, determined on grounds of social policy, and that it is only by an intellectually indefensible fiction that they can be deduced from a written document such as our Federal Constitution. Justice Holmes's own repeated protests against the unconscionable stretching of such terms as *liberty* in the Fourteenth Amendment to void laws that a majority of the judges do not approve offer some evidence that a federal council, as in the case of the Swiss Confederation, could adjust state and federal relations on taxation and the like in a manner no worse than we do by giving the last word to judges who are trained and think in terms of private law.

#### THE REALISTIC SCHOOL

While the term realistic is now extensively applied to a number of recent juristic writers, it is rather difficult to formulate any positive doctrine on which they all agree. Some of them, indeed, profess a deep distrust of all doctrines. Yet, it is clear, they all reject the classical view that the law consists of fixed principles and that cases are actually decided by purely logical deduction from them.

There certainly is no connection between the realistic movement in law and the two forms of realism (neo and critical realism) in recent American philosophy; for the latter emphasize the reality of universals or essences, while the legal movement is

decidedly hostile to that, and most of its members seem inclined to nominalism.<sup>39</sup> It uses the term realism in the sense in which it is used in literature; namely, true to the actualities as opposed to ideals. Some hostility to idealism is already implicit in Holmes. Contemporary legal realists, however, have not shown much interest in the philosophic foundations of their point of view. One must stand outside to discover the intellectual currents that have taken them up.

The first pronouncement of this school came in the volume entitled *Centralization and the Law*, to which the venerable Melville Bigelow and Brooks Adams were the principal contributors. Dean Bigelow, who had done splendid pioneer work in the field of legal history, came out strongly for the view that the law is something that actually holds sway in human society and that the rights of individuals must be judged entirely in terms of social effects. Brooks Adams dealt with the law on the principle of a monistic economic determinism, without mentioning Marx or any of his followers. Despite the great eminence of its contributors, and the obvious relevance of its ideas to the progressive movement which had begun about that time, the volume failed to stir effectively the current of American legal thought—though it would be hard to assert that the tenth edition of Bigelow's book on *The Elements of the Law of Torts*, in which some of these ideas were applied, exerted no influence.

On a somewhat wider philosophic basis was Bentley's *The Process of Government*, in some respects still the most vigorous expression of legal realism in America. Some time before behavioristic psychology came into its vogue, but shortly after William James's attack on consciousness as a substance, Bentley opened a vigorous war against mind stuff or mental qualities as an explanation of social phenomena, and particularly against the use of emotions, instincts, and ideals as if they were separate substantial

entities acting as causes. From this point of view, he submitted to drastic criticism not only all the regnant sociologists, but also jurists like von Jhering and Dicey. Von Jhering's interests or ends (*Zwecke*) and Dicey's ideas, such as individualism and collectivism, are not in themselves social realities. They are nothing apart from certain factual contents, the explanation or mechanism of which they in no way describe or indicate.

In accordance with the current distrust of the abstract as unreal and preference for dealing with the totality of things (common to Neo-Hegelians like Bradley and Bosanquet, and instrumentalists like Dewey), Bentley views the law not as an abstract system of principles but as an actual social process. It is not merely what judges do or will do, but what happens in a society in which various groups seek to control certain transactions or forms of conduct. From this point of view he saw what had previously been expressed by H. J. Ford, to wit, that political organs and divisions are not absolutely rigid and fixed, but are to some extent plastic, and that they shift their function under the pressure of diverse groups. Bentley thus laid the foundation of the study of what later came to be called "pressure-politics."

Bentley deflates the metaphoric or fictional element in the usual talk about the social will. The actual fact before us is that of action and reaction between classes and groups. In this view there is no denying or even minimizing the importance of documents, precedents, doctrines, judicial attitudes, and the like. But these things are the raw material of the legal process.

When we thus view the law socially, the differences between public and private law and between criminal and civil law ceases to be of great importance. The smallest dispute between two parties involves questions of general import to classes of people. We try not the particular individual but the *murderer* (and thus introduce the abstract conception). "It is impossible to try a mur-

derer purely as an individual. Actually the murderer, that is the murdering activity, is just as much generalized, just as much 'social' as is the rule."<sup>20</sup> Bentley thus distinguishes between formal and actual law. An unenforced statute may more readily become law, because the group that brought about its enactment is likely to insist that the government machinery enforce it; but the actual enforcement is the social fact.

Bentley recognizes, as every honest thinker must, that law is made in the course of administration by the process of filling in details, and that all the various portions of the governing body, judiciary as well as executive, participate in this process. Although the law is developed by individual judges, it is misleading so to overemphasize that fact as to lose sight of the interconnection which gives us a system instead of merely diverse judgments like disconnected pebbles. To be sure, not the whole of society but definite groups favor any specific law to the extent of pushing its claims. Still there is the great reality of social inertia which tends to create respect for the judiciary, so that the fact that judges have ruled in certain ways itself becomes a determining factor.

Groups tend to unite on common interests, and to that extent the content of the law spreads. While laws come into being to meet certain specific difficulties—*e.g.*, the laws of quarantine—once a law exists many interests will seek to avail themselves of it and thus spread its influence.

In determining the various groups that make the law, we need not ignore the interests of the lawyers and of the court itself. They are interested in precedents and technicalities, which save them the labor of having to think long before deciding. Out of this develop general doctrines. In the conflict between group interests before the court, advocates base their claims on general reasons. These reasons tend to form a rational system and consti-

tute a legal theory. The theory may then become a philosophy of law.

Bentley's book fell on a deaf world. There were few members of the legal public to pay attention to it, and leading sociologists like Small could not understand it. But in the postwar period behavioristic psychology attained great vogue and its influence spread into all the social sciences. Possibly the forms of anti-rationalism that came to the front (described in Aliotta's *The Idealistic Reaction Against Science*) were a factor in the situation. At any rate, we notice economists, sociologists, and political scientists abandoning the old classical methods and aiming instead to describe institutional behavior rather than the logical consequences of assumed laws. It was, therefore, to be expected that a revolt against the traditional ideology of the law should turn to the positivistic view of scientific method prevailing in neighboring fields.

The influence of behaviorism in legal thought, or at any rate in its formulation, is shown in the writings of Oliphant, and even more characteristically in those of Underhill Moore. Oliphant is rightly impressed with the untenability of the classical view that every case decides a principle; for, obviously, many principles of diverse generality can be adduced in support of any particular decision. Hence, to argue that any particular case determines a principle as its *ratio decidendi* is clearly fallacious. Professor Oliphant is also impressed with the fact that the course of actual decisions does not coincide with the reasons stated in the judicial opinions that accompany and justify them. He wishes, therefore, to disregard the written opinion ("vocal behavior") and study what the judge actually does (subvocal behavior). He does not, however, give us any clue to what part of the judge's behavior is relevant to a course of decisions. Suppose, for instance, that for several years the courts of one or more states continue to extend



the liability of railroads or banks. It would seem clearly irrelevant to consider as a cause any physiologic factor or temperament that either varies with different judges who participate in this movement or is common to judges who do not. A variable factor cannot possibly explain a constant effect. Moreover, though the reasons judges give for their decisions may sometimes be but a "rationalization" or afterthought and not a real determinant, still it would be strange if ideas that recur in discourse had no influence at all on the course of decisions. It would seem, therefore, that the expression of judicial opinion cannot be neglected by one who wishes to understand the actual course of the law. To determine *all* the different ideas that move a judge to decide any one case seems hopeless. But, if we take a series of cases, we can eliminate variable factors and discover constant ideas or patterns, such as political or economic convictions or bias.

Even more consistently behavioristic is Underhill Moore, who conceives the law to be the behavior not of the judge but of all the parties to any social transaction. Law, therefore, becomes identical with custom, and jurisprudence is replaced by descriptive sociology. The law of checks is simply what happens in the various transactions in which the check enters. Professor Moore has ingeniously worked out a number of categories to describe these transactions, but in the end he has no consistent and coherent test whereby to distinguish the legal from the illegal.

In modern heterogeneous and rapidly changing society the legal cannot be identified with the customary—indeed, it is the diversity of customs and their uncertainty under changing conditions that largely necessitate modern lawmaking. At any rate, there can be no doubt that the usual practices of modern business are largely determined not only by legislative enactments but also by what courts have thought the law is or should be. There is, therefore, no way of drawing the distinction between legal and

illegal behavior without reference to the system of ideas which authoritatively prescribe what we should and what we should not do.

Other realists have, therefore, made the concept of legal behavior refer to the conduct of government officials. Taking a phrase of Justice Holmes out of its contextual limitations, the realistic doctrine becomes: Law is the prediction of what judges will decide. But who is properly a judge, or when is he acting within his legal power, itself depends upon our system of legal ideas. To define the law as what the courts will decide is, as others have pointed out, like defining medicine as what the doctor will prescribe—it misses the question which faces the doctor or the judge, *viz.*, what he *should* prescribe or how he *should* rule. The lawyers arguing a case are not merely predicting what the court will decide. Judges of a court in conference or the individual judge deliberating how he should rule are not concerned with predicting the future. And surely the legal critic pointing out the merits or demerits of any ruling is not engaged in the process of prediction. Yet obviously lawyers, judges, and writers who are systematic critics of the law do play a large part in making the law according to their ideas. We cannot, therefore, understand the process of lawmaking without taking account of the prevailing system of legal ideas and principles. But the nominalistic bias is hostile to the patient analysis of legal ideas and to the logical methods thus involved.

The question of logic becomes crucial in the discussion of the element of certainty in the law. So far as the law does proceed from definite rules in a rigorously deductive way there can be no more uncertainty in it than in mathematics. The actual uncertainty arises from the fact that when we try to apply legal principles to an actual situation we generally find them either meaningless or else discover that other principles leading to different

results seem equally applicable. Now in many regions (though not in all) the content of a rule is not as important as that the rule be as certain as is humanly possible; and in the natural confusion between what *is* and what *ought to be* our traditionalists tend to exaggerate the extent to which the law actually is certain. Using a method that has been most useful in the natural sciences, namely, ignoring perturbations or disturbances caused by other factors and describing the ideal condition of our system when such disturbances are ignored, one can describe the ideal of the law as perfect certainty. Now such an ideal is something which every lawyer, judge, or systematic jurist must employ if he is to find or make any order, system, or meaning in the law. Those, however, who are not interested in intellectual processes, which make science or system possible, and notice how often the expectation of litigants is frustrated, are naturally unsympathetic with the effort to find any certainty at all in the law. This is one of the main points of Jerome Frank's book, *Law and the Modern Mind*. Relying on psychoanalysis, which had been introduced into the field of politics and law by Lasswell and Goitein, Mr. Frank traces this demand for certainty to the child's reliance on the authority of the father, and, with a logic characteristic of psychoanalysis, concludes that those who insist on as much certainty as is attainable are childish.

Mr. Frank's book made a great impression among the legal modernists, though the psychoanalytic explanation of what he calls the great myth has not proved very persuasive. His subsequent work was directed toward calling attention to the disturbing factors which prevent legal rules from operating under certain conditions, for example, moving judges or juries by passion or bribery—the possibility of which no systematic jurist denies. The mere fact, however, that there are disturbances, that some people bribe juries, shows that there are recognizable legal rules which we normally expect to prevail.

A somewhat more trenchant use of psychoanalysis to discredit legal rationalism is Professor Arnold's *The Symbols of Government*. Classical jurists, such as Dernburg, von Jhering, Toulon, and Holmes, had called attention to the fact that as men live by symbols, the legal realm could not be an exception, and that, therefore, many legal rules and ceremonies must be studied from that point of view. Professor Arnold, however, seems less interested in developing the positive content of this approach to the law than in its polemic use to show the absurdity or irrationality of our legal institutions by viewing the striking disparities between the rational principles which we profess and the courses of conduct which we actually follow. He also takes delight in showing what practical inconvenience and inhumanity follow from such devotion to ideals, principles, or theories, somewhat as the author of *Don Quixote* might have done. Yet Professor Arnold does not want to be merely critical. He thinks of psychiatry as a science and that the law would become more humane if people were treated as they are in a lunatic asylum—though he recognizes that this is hardly an attainable ideal. (This is worth noting, in passing, as an interesting indication of the reaction against the legal and practical notion of responsibility.)

Professor Arnold assumes that psychiatry is a science and that it knows how to cure people. But he does not ask, When is a man cured of other than recognizable physical disease? Reflection might show that the only criterion we have of normality is the ability to behave in accordance with the prevailing ways of our community, and that is largely a moral standard. The only other test actually used is the patient's own belief that he is cured and that, of course, is affected by all sorts of faiths that do not rest on natural science.

A companion volume to Arnold's book, and sharing its near-sighted craving for the method of the natural sciences in legal studies, is Robinson's *Law and the Lawyers*. Like other positivists,

he starts with the assumption that science must restrict itself to the study of the facts of existence and concludes that we must, therefore, get rid of all ethical ideals about what law ought to be. This, however, ignores the fact that all developed sciences proceed from theories and the consideration of ideal conditions, *e.g.*, rational mechanics, thermodynamics, physical chemistry, and the like. Moreover, Professor Robinson himself views the law as a form of social engineering. But how can we engage in any form of engineering without some idea of what is worthwhile achieving? We must, of course, recognize the facts of existence, which are often, alas, not as we should like them to be. But that, however, is only a necessary and not a sufficient condition. Ideas of the desirable social aim in the law are indispensable. And if we do not subject these ideals to a critical study, we continue to use them in traditional and superstitious ways.

#### FUNCTIONALISM

Less antirationalistic, though still vigorously opposed to the traditional, logical methods of the fundamentalists of the Harvard school, are a group of writers who call themselves functionalists. The chief objective of this group is the study of the law as it actually operates in the social milieu. Pound had already included this in sociologic jurisprudence, but these writers are more emphatic and make it their primary objective. The functional approach is distinguished from the historical, which describes how rules originated, and from the analytical, which is interested in the internal logical structure of legal doctrines. The meaning of a penal law, according to this view, is the set of social processes which it starts in operation. Justice Holmes had already indicated that we do not know but only guess how much actual good or evil the criminal law brings about. The functionalists stress the importance of taking pains to find this out. So far, this seems to

be mainly a program, and it is curious to note that the principal factual inquiry along this line has been made by Professor and Mrs. Glueck who seem to be much more under the influence of the Harvard school than of the functionalists.

The leadership of this functional school may well be attributed to Professor W. W. Cook, who seems to have exerted considerable influence on his colleagues at Yale and at Columbia. Professor Cook was trained as a mathematical physicist and, unlike most law professors, he has had some firsthand knowledge of the methods of the natural sciences. Adding to this some familiarity with the trends of modern logic, Cook has been able to bring effective criticism against the traditional assumption of self-evident principles. Cook's own work has been mainly in the field of conflict of laws, but so far his magnum opus has not been published. The school of jurisprudence that he organized at Johns Hopkins and which seems to have devoted itself mainly to statistical studies was not, unfortunately, able to carry its work far enough to show significant results.

With somewhat less regard for theoretical programs but with admirable persistence in applying these new ideas to legal material are the studies of Professor Corbin in the field of contracts and those of Dean Clark in the field of pleading.

Starting from a sociologic point of view, in many respects similar to those of Ehrlich, Professor Llewellyn's conception of jurisprudence is that of a study of the typical modes of conduct which the law regulates. At times he conceives the law also as the conduct of government officials, which is, of course, not quite the same as the conduct, let us say, of merchants in buying and selling. Like Ehrlich, Llewellyn tends to underemphasize the logic of litigation, for it is the atypical case that gets into court. The question, however, what effect a court decision will have upon the general practice cannot be ignored by one interested in the

interaction between law and general economic activity, for business practices are framed with a view to their legal obligations. Explicit recognition of ethical issues does not seem to find favor in contemporary legal realism.

It is the merit of Dr. F. S. Cohen's work, especially of his *Ethical System and Legal Ideals*, to have attempted this task on a broad philosophic basis and on adequate legal knowledge. It is not at all certain that he has succeeded in combining the "intrinsic goodness" of G. E. Moore with the stark hedonistic utilitarianism of Bentham; for the former is essentially objective, independent of human preference, and indeed of human existence, which pleasure and happiness certainly are not. In view of the insuperable difficulties of finding a common denominator for all forms of happiness or of arriving at any objective process of measuring or weighing heterogeneous pleasures against each other, we cannot expect this kind of work to be available for the immediate settling of actual legal cases. In the end, however, such analysis clarifies our ideas on the relation between law and the various human values that are set up as its goal, and this is a necessary first step for dealing with legal issues intelligently and honestly.

#### THE OUTLOOK

The liberalization of legal studies is likely to be aided by movements in three allied fields; to wit, economics, political science, and philosophy.

The emphasis by writers like Commons, Veblen, and others on the actual institutions which control economic activity is bound to call attention to the more intimate relations between law and economics. There is a possibility, however, that institutional economics may become purely descriptive and devoid of

significant ideas, just as happened in the previous reaction against pure economic theory by the historical school.

While political theory seems to be passing through a singularly unpromising period, it has liberated itself in large part at least from the scholastic constitutionalism of the late Dean Burgess, and in the treatment of administrative law it seems to have already opened the way for a more realistic and constructive mode of study.

Traditional American legal thought not only directed its energy primarily to private and commercial transactions, but it took a certain pride in minimizing administrative law. This, of course, followed from the dogma of the supremacy of the civil courts and the subordination of all public law to the forum where dominate lawyers representing private clients. But with the expansion of government machinery, the growth of administrative law could not be stopped. Courts might theoretically control the administration of public office, but in fact this is not feasible beyond a limited extent; and the absence of administrative courts thus actually serves to give practically unlimited discretion to the official. For technical reasons also, special administrative courts to determine questions of custom duties and various issues in other departments of the government arose, and various industrial and public-service commissions began to exercise governmental duties that could not be split up into executive and judicial. The two men who had the wisdom to see the growing importance of administrative law and to consider closely its nature and relation to other departments of jurisprudence were Goodnow and Ernst Freund. Goodnow began with the study of municipal government and went on to the wider study of comparative administrative law. He realized the inadequacy of our blind rejection of the Continental system, according to which



centrally appointed officials administer locally enacted laws, instead of locally elected officials administering centrally enacted laws which is the American way. Coming to his subject from the point of view of political science rather than from the orthodox teaching of law, Goodnow shared the aversion of historicists to the natural-rights philosophy. This made him sympathetic to the movement for social reform and opposed to a narrow interpretation of the Constitution.

It is characteristic that when Burgess retired as Ruggles Professor of Constitutional Law at Columbia, Goodnow was passed over and a conservative "common-law" lawyer of little if any scholarly achievements was appointed. The latter, however, lectured only in the Law School and in the end scholarship triumphed through the appointment of McBain, a careful and conscientious student of constitutional and municipal law as they actually operate under our political institutions.

The doctrine of natural rights and the traditional theory of a division of powers strictly limited by what is found in a written Constitution would have made actual government impossible had not our courts found the device of a police power inherent in the states to protect public safety, health, and morals. What is within the police power and what is not has never been definitely determined, being in fact largely dependent on the personal opinions of the judges about what states and municipalities should or should not do. Professor Freund, however, has dealt with this problem in a courageous, scholarly manner and has sought to clarify the actual body of American decisions in some rational way. Despite a good deal of natural revulsion against the nebulous speculation that often passes as legal philosophy, he was never quite satisfied merely with digesting the actual decisions but always sought to find a genuinely rational pattern which should aid us not only to harmonize the actual decisions

but to supply illuminating ideas on the direction in which the law can wisely be pushed. There seems to be a good deal of promise that work along this line will help to clear the ground of much legal superstition.

On the part of our professional philosophers there is still little attention to political and legal philosophy. Professor Hocking of Harvard has written on the state and on rights, but he has been a lone voice in the idealistic camp. This is rather surprising, for Josiah Royce had developed the organic view of federalism by emphasizing the dangers both of too much centralization and of provincialism or separateness. But the idealistic school of philosophy has made no attempt to work along this line. It must be added that, if pragmatic philosophers were to follow William James, their interests in political philosophy would be small and their views predominantly and conservatively individualistic. James, however, did strengthen utilitarianism, which may again become a dominant note in legal philosophy if traditional liberalism can recover some of its old force. More important, however, is the vital sense of justice and sympathy with human needs shown by John Dewey and J. H. Tufts in their great textbook on *Ethics* and in other of their individual writings. Perhaps the union of this tendency with the growing interest among younger American philosophers in logic and rigorous scientific procedure may lead to a genuinely realistic philosophy of law—realistic not only in recognizing what actually exists but also in perceiving the finer possibilities which are worth achieving.

## NOTES

<sup>1</sup> WILSON, THE WORKS OF JAMES (1804) 17. Cf. 3 *id.* 292.

<sup>2</sup> *Id.* at 126.

<sup>3</sup> LOAN ASSOCIATION v. TOPEKA, 20 WALL. (87 U. S.) 655, 663 (1874).

<sup>4</sup> BERTHOLD v. O'REILLY, 74 N. Y. 509, 515 (1878).

<sup>5</sup> 3 BEVERIDGE, LIFE OF MARSHALL (1916-1919).

<sup>6</sup> Thus, if he had known the constitution of the French Republic, he could not have argued that all written constitutions must give judges power to disregard a legislative enactment that they deem unconstitutional.

<sup>7</sup> No scholar today will defend either on historical or on logical grounds Marshall's argument in *Marbury v. Madison*, 1 Cranch. (5 U. S.) 137 (1803) that the section of the Judiciary Act of 1789 was unconstitutional. That Act was drawn by several framers of the Constitution and one of them, Ellsworth, became Marshall's predecessor as chief justice of the United States. It would certainly require very cogent arguments to prove that these men, the members of the First Congress who passed the Act, and President Washington, who presided at the deliberations of the Constitutional Convention and signed the Act, either were all ignorant of the Constitution or wilfully disregarded it. Logically, Marshall's argument that Congress could not give the Supreme Court original jurisdiction in mandamus proceedings, because this was not mentioned in the second clause of Section 2 of Article III of the Constitution, rests on the untenable assumption that grants of jurisdiction must be exclusive and that otherwise the clause would have no meaning. But this is quite fallacious. An affirmative grant of jurisdiction to the court may mean that Congress cannot take away that jurisdiction. It does not mean that Congress may not add to it. In fact, the Supreme Court subsequently ruled that the grant of original jurisdiction to it was not exclusive and that it could also be conferred on district courts (in the case of consuls). Marshall's decision in *Marbury v. Madison*, *supra*, was a clever trick for escaping from an embarrassing situation, into which the federal courts had become involved when the Federalist Party created judicial offices for its followers after it was defeated in the election of 1800. The trick is obvious when we note that in quoting the Constitution Marshall left out the concluding words of the second clause of Section 2, Article III, which gives Congress express power to make exceptions to the appellate jurisdiction of the Supreme Court. For a clear indication of the unfortunate logic of *Marbury v. Madison*, see FREUND, STANDARDS OF AMERICAN LEGISLATION (1917) 276-277.

<sup>8</sup> POMEROY, MUNICIPAL LAW (1864) § 12.

<sup>9</sup> *Id.* § 353.

<sup>10</sup> *Id.* § 38.

<sup>11</sup> *Id.* § 286.

<sup>12</sup> OXFORD STUDIES (1890).

<sup>13</sup> AMES, LECTURES ON LEGAL HISTORY (1913) c. 18, p. 218.

<sup>14</sup> GRAY, NATURE AND SOURCES OF THE LAW (1909) § 656.

<sup>15</sup> *Id.* § 645.

<sup>16</sup> Cf. Judge Fowler in HARVARD LAW REVIEW for 1914.

<sup>17</sup> A certain hesitancy in carrying out ideas is perhaps responsible for an excessive tendency to taxonomy, a fondness for classifying thinkers or doctrines without regard whether such classification is really helpfully promoting a better understanding or how they actually function. Thus the classification of jurists into analytic, historic, philosophic,

and sociologic is neither logically satisfactory (because overlapping) nor very fruitful in promoting an understanding of such radical differences as those between men like von Jhering and Gierke. On the other hand, Pound's account of the stages of legal development tends to set up as rigid historical periods what were at first only stages of discourse; that is, points of logical analysis in what is perhaps nothing more than the general rhythm between the forces of growth or expansion and the forces of organization which dominate the law as well as other social institutions at all times.

<sup>18</sup> Though Justice Brandeis's professed principles are rooted in the classical belief in competition (see my review in the *HARVARD LAW REVIEW*, November 1934), his sympathies and understanding have led him to justify state restrictions, as in the *Oklahoma Ice Case*. He has also, by his emphasis on the factual side of every case, given aid to the realistic school.

<sup>19</sup> The nominalistic note was first struck by Professor Bingham who, starting from the assumption that there are no universals in nature, insisted that the law consists of actual decisions in individual cases, and that legal rules or principles are merely opinions in the minds of those who think about the law.

Bingham's articles were published at a time when the classical theory was otherwise unquestioned and, though they drew a reply from Kocourek, they continued to be ignored until attention was called to them two decades later by Frank and Llewellyn.

<sup>20</sup> BENTLEY, *THE PROCESS OF GOVERNMENT* (1908) 280.

# HAS CAPITALISM FAILED IN LAW?<sup>1</sup>

HERMANN KANTOROWICZ

## I

**H**AS capitalism failed? Most persons, even many capitalists, will answer in the affirmative. Many economists will side with them. The question is, indeed, basically economic, but it also embraces all the other provinces of social life. I will try to consider, as far as possible, only one side of the problem: Has capitalism failed in law? My answer will be in the negative: Capitalism has not failed in law nor, for that matter, in economics.

Such a sweeping assertion is evidently influenced by a certain politico-philosophical conviction. I want to state my own point of view at the outset: it is liberalism. This is a very unpopular standpoint, to be sure, but this cannot shake my conviction. On the contrary! Nobody can deny that the economic world is an unprecedented chaos. Therefore, all popular attempts to correct capitalism, which have had, and still have, an influence on economics, such as socialism, communism, interventionism, nationalism, fascism, are likely to have contributed to that hodge-podge. Liberalism alone has ceased to be considered a cure for the evils of capitalism.

## II

Let us first hear the usual criticism of the effects of capitalism upon law. They have been advanced by eminent thinkers—for example, in this country by Professor Cohen, in England by Professor Laski, in Austria by Renner, in Germany by Professor Radbruch. The gist of it is: Capitalism contradicts its own legal basis. This basis, as exposed, for instance, by Professor Commons

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and Professor Diehl in their books on *Legal Foundations of Capitalism*, is purely individualistic; every economico-legal unit is a "person" and a person is a capitalist as well as a proletarian—the rich as well as the poor, the weakest worker as well as a gigantic corporation. The characteristics of this abstract person are legal equality, equal freedom of acquiring property, equal freedom of contract. But liberty includes the liberty of the strong to oppress the liberty of the weak and this perverted liberty has become economic reality. Freedom of acquiring property is inevitably also freedom of disposal over men, freedom to command human labor by dictating their wages and to tax fellow citizens in the form of rents, utility charges, and fees. *Dominium* becomes *imperium*, becomes "capital" in its technical sense.

Thus arises a tension between law and reality, the liberal individualistic law which is the ideological basis of economic reality and this reality itself; and the more capitalism progresses, the more it degenerates into economic dictatorship. There is no remedy to be expected from those organs of society which have to enforce that law, especially from the courts. For the courts have to apply the law, and the law, as we said, is so abstract that it cannot easily be said to be violated by whatever form of exploitation and oppression develops under its aegis. Of course, there may be and practically there are everywhere special statutes for the protection of the weak; there is a whole body of social legislation. But, say the socialist critics, these laws, again, offer no protection; the law always lags behind the economic development and those elderly men called judges who, as a rule, are even more conservative, lag behind the law. This, it is asserted, is especially dangerous in the case of the United States, where the abstract principles of liberalism are embodied in the old eighteenth-century Constitution and where the courts have the right to declare every statute and act of Congress void if contrary to the Constitution. More-

over, the judges in this country are selected from the most successful lawyers, *i.e.*, from the most successful advocates of capitalistic interests.

### III

Let me quote just one example: *Adkins v. Children's Hospital of the District of Columbia*.<sup>2</sup> In this famous case Congress, by an act of 1918, had provided for the fixing of minimum wages for women and children in the District of Columbia. Now the Supreme Court had to deal with two cases: one of the women employed in a hospital, the other of a woman employed in a hotel. They were all contented with their wages, at least they could not find better jobs; therefore they claimed an injunction against the Minimum Wage Board to restrain it from enforcing its order on the ground that this order was in contravention of the Constitution and particularly the famous clause of the Fifth Amendment: no person shall "be deprived of life, liberty, or property, without due process of law." In the first instance the injunction was granted; in the second instance it was refused and this decision was upheld by the court of last resort. Justice Sutherland, in delivering the opinion of the Court, said among others: "that the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decision of this Court and is no longer open to question. . . . Within this liberty are contracts of employment of labor." The Court then referred to other cases, such as *Lochner v. New York*<sup>3</sup> and *Holden v. Hardy*,<sup>4</sup> in which statutes fixing maximum hours of labor had been held unconstitutional "as an unreasonable, unnecessary and arbitrary interference with the liberty of contract." The Court declared, among other more or less convincing arguments: "The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that

of the employee," thus barring the suspicion that the decision was in the interest of big business.

#### IV

In view of such decisions the socialist critics say: Let us establish a social law instead of an individualistic law. Let us do away with that abstract being, the "person," and let us face the typical social figures behind it, the social positions with regard to power and powerlessness, the figures of the entrepreneur and the wage earner, the worker and the employer. Not to protect an alleged equality, but the equalization of what is really unequal ought to be the aim of the law. Thus the individual ought to be conceived of by the law as a social unit, a member of the community, and, therefore, even the most private legal affair ought to become a social relation in which not only the parties immediately concerned have a say but also, and above all, society. By all these means, and only in this way, can we reach the great goal, the concordance of reality and law, or of the law's form and its matter.

#### V

Now all this sounds very convincing, and I am afraid I have just made more adherents to the socialistic outlook. Let me, therefore, try to show the flaw in this argumentation. This is really very simple and obvious: All that has been said does not prove that capitalism has failed in the sphere of law; it proves that those who ought to have adapted the law to changed circumstances and the ideals of social justice have failed. I do not deny for an instant that in the name of the law crimes have been committed, but I do deny that the accused is the perpetrator. Responsible, on the one side, are the whole legal profession, judges, lawyers, and teachers of law, and on the other side the weaker classes of those



subject to the law, especially the laborers. The legal profession is called upon not only to administer the given law but also to develop, adjust, and reform it, and this is in particular the task of enlightened judges. This task is today recognized everywhere. Efficient work has been done in France by the sociological school of Geny, Saleilles, Lambert; in Germany and Austria by the "free law movement," of which it may suffice to name men like Ehrlich, Zitelmann, Ernst Fuchs, and that unknown author who writes under the pseudonym of Gnaeus Flavius. In America we may point out leaders of legal thought like Dean Pound, and among the judges the honored names of Oliver Wendell Holmes, Louis D. Brandeis, and Benjamin N. Cardozo. We now know that every legal concept is vague and lends itself to various constructions; that every legal rule, no matter whether embodied in decisions or statutes, permits various interpretations; and that those constructions and these interpretations must be determined by the social, economic, and political conditions from which we can infer the objective purposes of the law (which ought not to be confused with the subjective intents of individual legislators). These purposes alone bind the courts. Therefore, as these conditions change, the application of the law must change correspondingly. The cases presenting themselves under the changed conditions are not similar to the cases decided, and the rule of *stare decisis* does not apply to them. The subject<sup>5</sup> is far too vast to be discussed here, but the arguments are given in full in the works of the aforementioned jurists, to which we may add the well-known writings of such American authors as Morris R. Cohen, Walter W. Cook, A. L. Goodhart, Karl N. Llewellyn, and many others.

These tendencies may already be called victorious. On January 8, 1934, the Supreme Court of the United States handed down a five to four decision in the *Blaisdell*<sup>6</sup> case. Here Chief Justice

Hughes, with whom Justices Brandeis, Stone, Roberts, and Cardozo concurred, declared among other things: "Where in earlier days it was thought that only the concerns of individuals or classes were involved and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected, and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." Even in that notorious decision of 1923 of *Adkins v. Children's Hospital*,<sup>7</sup> only five of the nine judges concurred in the view that fixing minimum wages was unconstitutional, and among the dissenting opinions we find Justice Holmes who said, with regard to the women who opposed the minimum wages law because they preferred low wages to no wages, "The fact that the statute warrants classification which like all classification may bear hard upon some individual or in exceptional cases . . . is no greater infirmity than is incident to all law." Here the social point of view as opposed to the individualistic is clearly apparent. The issue is, however, clouded by the habit of calling the judges either "conservative" or "liberal." But if we use these terms in their classical meaning, the "conservatives," being individualists, ought to be named "liberals," while the alleged "liberals" would more appropriately be called "solidarists." If one wishes to denote not the political tendencies of the judges, but the more or less great rigidity of their method, the "conservative" judges ought to be opposed to the "progressives." Of course, the "progressive" and "free" methods of interpretation presuppose a more dynamic attitude toward law and State in general than that of the traditional method. It implies the conception that judges are creative organs of the law's development and not, as the Byzantine dogma would have it, mere tools of an omnipotent lawgiver, not what Montes-

quieu called them, "*des êtres inanimés, la bouche qui prononce les paroles de la loi.*" This ancient philosophical conception is the cultural background of the American Constitution, and to it we must add the social conditions in precapitalistic Colonial times, which made centralization of legislative power impossible and a rigid federal constitution desirable. Both reasons explain decisions like that in the *Schechter Case*.<sup>8</sup> Here too, capitalism is unjustly blamed when it is asserted that this decision shows how social progress and economic reform are incompatible with the laws of a capitalistic society. Under any of the modern and elastic constitutions of the centralized capitalistic European states this decision would have been partly unnecessary, partly impossible.

## VI

The other group that is to blame for what capitalism is saddled with is the working class. It is up to them to organize themselves so powerfully that the same abstract liberty of property and contract which so often works to their disadvantage cannot be turned against them, but becomes their own weapon. Then they would need no special laws of dubious constitutionality, since no courts, however conservative, could interfere with their aspirations and politics. One ought not to oppose that such a task far transcends "the strength and the tools of the labor class." This great problem, likewise, cannot fully be discussed here, and, moreover, the lawyer must leave it to the political scientist. I restrict myself to the raising of two questions. Has the labor class ever earnestly tried to put an end to the fratricidal internal struggles that account for its lack of strength, the struggles among socialists, communists, and syndicalists, among Marxian, Christian, and national socialists, between skilled and unskilled, organized and unorganized, native and foreign labor? And why have they nowhere developed, as their indispensable tool, a labor

press of a high journalistic level, instead of abandoning the workers, especially in America and until lately also in England, to the lowest type of the bourgeois newspapers? Capitalism has certainly not fostered the unity of the workers nor favored an independent labor press. But if labor were bent upon having both it would have them, and through them control of every capitalistic country. Of course, all this presupposes again a certain political situation; namely, democracy, especially educational democracy. But democracy is not incompatible with capitalism or less incompatible than any form of government that has been tried out in history. On the contrary, capitalism is based on rational foresight, particularly on strict application of the laws by impartial courts, guaranteeing equality before the law. The founders of American capitalism have been described as "robber barons" and their successes attributed to a long series of unpunished crimes. But what does that prove except that American political democracy has not kept pace with its economic sister, capitalism? The original "robber barons" were a precapitalistic and predemocratic phenomenon. Here lies the solution of the problem which, of course, can scarcely be sketched in the few minutes at my disposal.

But first we have to give some more precision to our question. The question whether Capitalism has failed depends largely upon what we understand by "failed." There are at least four possible meanings. Do we mean "failed" as compared with the precapitalistic, for instance, the feudal-handicraft economics? Those who dream of a return to those golden days are romantic ignorants, and every student of economic history will tell them that in precapitalistic times the average peasant, to say nothing of the agricultural laborer, had less bread, worse housing conditions, less security of existence, minor civic rights, and far fewer enjoyments than even the unemployed worker of today. Unemploy-

ment, it is true, was less frequent, but its place was taken by famine which was a normal phenomenon of precapitalistic Europe and still is in every noncapitalistic and the one postcapitalistic country. Unjust discriminations between rich and poor in the law and its administration are still very frequent, but capitalism cannot be made responsible for them since every precapitalistic society was far worse in this respect. Nor ought it to be overlooked that precapitalistic economics did not provide even that modest measure of "equal opportunity" which the allegedly antidemocratic capitalistic system provides indeed. I am, of course, alluding to the modern methods of saving and credit, which have been so successfully developed in America. It needs courage to say a word in favor of American banking to an American audience, and I am fully conscious of the tremendous misuses the credit system has been exposed to, especially in this country. But there is no tool, however useful, that cannot be misused for criminal purposes, and it is the task of the law to frustrate them. This is not an appeal to interventionism but to coercion of those who menace economic liberty, coercion in the interest of economic liberty, just as a State based on tolerance must be intolerant of nothing except intolerance.

Or does one mean "failed" in comparison with the achievements of the postcapitalistic system of socialism? This question we cannot answer, because socialism has never been successfully tried and socialists generally decline to tell us how their society would work, a question on which Marx himself has put his taboo, probably for good reasons.

Or does "failure" mean failure compared with the hopes and promises of the fathers and first advocates of capitalism? Here the answer may seem doubtful. We have certainly not lived to see the promised land of general welfare, of harmony of interests, constantly progressing wealth, world-wide free trade, and per-

manent peace. But I suspect very much that our grievances are due less to capitalism than to the constant interferences with the autonomous mechanism of the market, which is the very essence of capitalism, and these interferences, although partly self-imposed, are often due to precapitalistic, particularly mercantilistic, tendencies which still survive—for instance, protectionism and its fruit, monopolies. Or they are due to extracapitalistic, because extra-economic, forces like nationalism which, I do not deny, the capitalists themselves championed, and insofar it may be said that capitalism has less failed than committed suicide. Here we meet with the World War, which was an outcome not of capitalism but of nationalism and which still remains by far the most important cause among the many causes of the present crisis, a crisis not of capitalism but of extracapitalistic forces. Or, finally, these interferences are a foreboding of an anticapitalistic system, of that very socialist system which has been developing in the last century under the garb of its enemy, capitalism. I was glad to read in a recent article by one of the greatest living economists, Professor Schumpeter, of Harvard, that the present crisis is due to a capitalism “which nations are determined not to allow to function.”

“Failure” may mean failure in the light of that ideal which is or ought to be the goal of every economic system: to secure for everybody a life worth living. Here the answer must be an emphatic denial. Capitalism has *not* failed to procure such an existence in those countries where the conditions for its own development existed until these conditions were disturbed by the present extracapitalistic crisis. If we group those countries in which capitalism was least hampered by interventionism, including protective duties and trade regulations, and by socialism, and most strongly united to democracy and liberalism, and on the other hand those countries where the opposite conditions pre-

vailed and capitalism was not allowed to "function," the contrast is overwhelming. On the one side we find modern England, the three Scandinavian countries, Holland, and, to a certain degree, Switzerland; they signify a comparatively high standard of living, especially of the working classes, a high general level of culture, the highest degree of honesty in business and private life yet attained, an efficient civil service, an incorruptible judiciary, a law-abiding population, peaceful foreign politics, contempt of militarism, high sexual and other morality, respect for women, protection of children, strong influence of religious and humanitarian forces—in one word, a world far from ideal, but less unfit for human beings to live in than any other we know. On the other hand we have all the other countries in which these enviable conditions are the less to be met with the more these countries have given up individualistic capitalism, democracy, and liberalism. I am speaking of protectionist America and France, fascist Italy and Germany, and of those countries that, like Spain and the Balkans, Russia and Turkey, China and India, have not yet reached that phase. The latter countries ought to look to the former for guidance, but as a rule, with the exception of England, they are not even mentioned. No one who would ask any of the American or English detractors of capitalism how they accounted for Danish or Dutch conditions would get a satisfactory answer.

I am fully aware that no considerations of any kind can save individualistic capitalism. I am convinced that the future belongs to State capitalism with a tendency toward socialism—to national, not to international, socialism. Socialist propaganda has made capitalism a spiteful byword which even the capitalists begin to be ashamed of using. Capitalism has been sentenced by history and public opinion, but the witnesses have been false, the advocates weak, the jury biased, and the verdict they returned was untrue.

## NOTES

<sup>1</sup> This article was Professor Kantorowicz's contribution to a symposium held in 1934 by members of the New School for Social Research Graduate Faculty of Political and Social Science ("University in Exile") on the question: "Has Capitalism Failed?" Two other members, Professors Lederer and Feiler, had discussed the economic aspects of the problem. Professor Lederer's contribution has been published in (1934) 3 AMERICAN SCHOLAR 294-301.

<sup>2</sup> 261 U. S. 525, 43 Sup. Ct. 394 (1923).

<sup>3</sup> 198 U. S. 45, 25 Sup. Ct. 539 (1905).

<sup>4</sup> 169 U. S. 366, 18 Sup. Ct. 383 (1898).

<sup>5</sup> This subject is dealt with by the author in Kantorowicz and Patterson, *Legal Science—A Summary of Its Methodology* (1928) 28 COL. L. REV. 679; Kantorowicz, *Some Rationalism about Realism* (1934) 43 YALE L. J. 1240.

<sup>6</sup> Home Bldg. and Loan Assn. v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231 (1934).

<sup>7</sup> 261 U. S. 525, 43 Sup. Ct. 394 (1923).

<sup>8</sup> A.L.A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 Sup. Ct. 837 (1935).



## VALUE IN LAW AND ECONOMICS

JOHN R. COMMONS

A STUDENT of mine tells me that he has found thirty-two different meanings of "value" in law and economics.<sup>1</sup> I am not surprised; I think he will find even more before he gets through. I myself had found twenty or more, without stopping to count them.

I will attempt to cross-classify them and to distinguish them by degrees of emphasis. The latter might be called the "principle of polarity."<sup>2</sup> The definitions differ in variable degrees of emphasis between the extreme poles that extend from subjective to objective; from individualistic to communistic, fascistic, or collectivistic; from materialistic to ethical; from philosophical to empirical; from transcendental to behavioristic; from scarcity to abundance; from efficiency to inefficiency; from legal to economic; from static to historical; from a concept of value to a process of valuation.

All of these meanings are distinct in themselves but they merge into one another, and some of them are more or less inseparable in fact—in which case each meaning is, as later economists would say, a limiting factor which prevents the complementary factors from going each to its own logical extreme. To this economic concept of limiting and complementary factors the physicists give the name "relativity." The business of science is to dissect this complexity of concepts, to define the meanings, to run each meaning down to its simplest formula, and then to devise the method of limiting and complementary factors, or relativity, which may serve to combine them into a whole. I call this whole the science of political economy, whose focus-idea is value.

I am concerned here with the historical changes in the ob-

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jective meanings of value, and I take the changing personnel and opinions of the Supreme Court of the United States and the changing personnel and opinions of economists since Adam Smith as my two sources in sketching the development of theories of value.

It is a tradition that there can be but one value for one thing at the same time and place, and that the business of economics and law is to investigate and find what that real value is. But there may be thirty-two different values of the same thing at the same time and place, depending on the purpose of the valuation. Older ideas in law and economics sprang from a notion, common to both sciences, of intrinsic, or real, or natural value, which would be the same for any particular thing, time, and place, and which could be found by investigation.

But we must look further, or rather nearer, than a single natural value if we would account for twenty or more different values at the same time and place. I would distinguish these nearer sources as process and purpose, and would give to the two terms combined the name valuation.

Valuation is a process with an end, or purpose, in view. We investigate process and purpose and we find them highly changeable in the economic transactions and justifications of the past hundred and fifty years.

Purpose ranges from extreme private purpose to extreme public purpose. Private and public are not separable. They differ in degree of emphasis. At one extreme it is asserted that public purpose is only the sum of private purposes and, therefore, to be subordinated to the protection of private property and liberty. At the other extreme the purpose of the sovereign may subordinate all private purposes. Uniting these extremes on the principle of relativity, a decision of the Supreme Court affirming a public purpose is an augmentation of value to some private persons and

a deprivation of value to other private persons. A legal valuation of railroads may augment the corporation's assets and diminish the shippers' assets, or vice versa. The latest grand change in the meaning of value made by the Supreme Court was the change in the measure of value from the weight of gold to the purchasing power of legal-tender negotiable instruments. It augmented the assets of a nation of debtors and diminished the assets of the same nation of creditors. It had to be justified as a public purpose in view of definitions of value in the past.

Process is inseparable from purpose. It is the means by which the purpose is approached. The process of valuation might be summarized, by analogy to biology, as the evolving structure, but in economics and law it is the evolving billions of transactions that make up the going concern of either the nation as a whole or any or all private concerns. The concern exists as "going" only as long as the members, working together, have a prospect of realizing beneficial transactions in the future.

This process is always a complex of individual and joint valuations. But, ethically, back of the process is the idealism, in both law and economics, of "a willing buyer and a willing seller." In economics a process worked out theoretically on this ethical assumption becomes "free competition." In law it becomes "reasonable value." Perfectly free competition in economics, without coercion, monopoly, or oppression of any kind, is, in law, the process of distributing reasonable values for the conflicting parties concerned, within the public purpose of free and equal opportunity for all.

Adam Smith, in working out his theories of value, started with this legal ethics. His was the economics of the common law of England, in both the concept of value and the process of valuation. His two contemporaries, Bentham and Blackstone, made a decisive split on this identity of law and economics. Bentham

based economics on the happiness, pain, and pleasure of individuals, but Blackstone followed the common law of liberty, equality, sovereignty, and the resulting reasonable values. Economists followed Bentham for more than a hundred years. Upon his foundations the only public purpose was the happiness of individuals. But the common-law courts spoke for the common interests of all—at first only the “king’s peace,” then the commonwealth or commonweal. From this standpoint they were compelled to decide conflicts of private interests which might defeat the public interest. Their decisions became precedents, traditions, both derived from and creative of custom. This process gave, more than all else, stability of expectations in place of the arbitrary and capricious wills of any dominant individuals, whether sovereigns or private owners. While economists started with Bentham’s pains and pleasures of individuals, separated from law and ethics but idealized as harmony of interests, lawyers started with Blackstone’s traditions and customs as rules of action designed for the public purpose of creating harmony out of the conflicting interests of individuals in all their transactions. The former led logically to the extreme pole of the liberty of anarchism, the latter to the opposite pole of order.

But the common-law courts and the common sense of economists did not go to these logical extremes. Only the French revolutionists went to the extreme of Smith’s logic. Smith’s common sense put up limitations. And the courts devised rules of action, not logical or mathematical, but designed to combine a degree of liberty and private initiative with a degree of public order. Only a fringe of heterodox economists went to the logical extreme of the perfect liberty and equality of anarchism, or the perfect deprivation of liberty in the interest of order by communism or fascism.

But there occurred, during the nineteenth century, an “indus-

trial revolution" in the technology of economics and a legal revolution in a universal right to incorporate with limited liability and perpetual succession. The one came from the physical sciences, the other from the pressure of business organizations to liberate themselves from the older legal decisions of individual liability in operating these huge enterprises and from nature's last word of death. At first corporations were looked upon as mere creatures of law having their residence at the locality of their incorporation. But the new technology of steam, electricity, and gasoline extended their operation across states, nations, and around the world. Hence new conflicts arose over valuations for the different purposes of taxation, regulation, equal treatment before the law, and avoiding discrimination and deprivation of liberty or property, which is the same as deprivation of assets. When these conflicts came to the Supreme Court for decision, the Court, in the last decade of the nineteenth century, changed the meaning of corporation from a legal entity residing at the place of incorporation to an economic going concern residing wherever it does business. Its business is its transactions, existing wherever it sells its products or services and obtains in return an income of money or its equivalent negotiable instrument.<sup>3</sup> Thus, at the end of the century, economics and law were joined after their long separation since the time of Bentham and Blackstone.

But the traditional economic theory of value and free competition did not change from its primary assumptions descending from Smith, Bentham, and Ricardo. An idealized free competition was its process of valuation, by which values and prices were determined. The theory, at the hands of Alfred Marshall in England and John Bates Clark in America, aided by new discoveries in mathematics, reached its perfection at the end of the century, after it had become obsolete. It became obsolete by the advent of new technology and corporations.

From a different direction—from the schools of commerce—came, in the twentieth century, first empirically, then theoretically, the principles of a new science of corporation finance which united law and economics. These schools had to declare their independence of the departments of economics in order to be free to make a new start with the concept of going concerns, taken from the actual practices of business, in place of the traditional concepts of individual production, consumption, valuation, and free competition.

But the two are not really separable in the larger science of political economy, which builds on the old and introduces the new. They come together on the principle of relativity, the economists' principle of limiting and complementary factors, or, as I would name it in law, the principle of strategic and routine transactions.

The advent of this momentous change from individual action to the collective action of going concerns in control of individual action, whether legally incorporated or not, required also momentous changes in the meanings of value and the processes of valuation. Free competition of individuals as the method of valuation disappears in the principle of relativity. It is free for some but not free for others, especially since the advent of world-wide corporations.

One reason for the lag in economic theory above mentioned was the quite different position which the economist himself occupied as a theorist and as a participant in actual public or private transactions. As a theorist he sought to get back to an intrinsic, or real, or natural value. He could see nothing fundamental or scientific in the mere empirical accidents of the billions of transactions, in a part of which he was engaged. They were not fundamental. But the court, in its taking of evidence and deciding of disputes, is deeply immersed in these very transactions and

the resulting values and valuations. They rationalize and compare what is merely behavioristic, and they try to bring a kind of order or consistency out of what is empirical and highly variable.

In this process of deciding disputes arising from transactions and valuations, they must take into account the economic changes that are going on. It is largely these changes that provoke the ever-changing valuation disputes that come before the courts. While using the same old words that have come down to them from ancient times, they must give to them a changing content or meaning. This is what all mankind does, and this accounts for the growth of language. But the court describes the actual process of changing the meanings of words as the "inclusion" of new meanings and the "exclusion" of inapplicable or obsolete meanings involved in the same words. We are now considering them in the special case of the words value and valuation.

Competition, as a process of valuation, is always in operation. It rests on the universal conflict of all living creatures in obtaining access to, or ownership of, the limited resources available. But, in human society, it is not free in the idealistic sense implied in the so-called natural law of supply and demand. It is always limited by innumerable other factors, all the way from protective tariffs to freedom of speech, legalized by the same superior authority that sustains liberty, initiative, equality, private property, and competition.

More realistic, therefore, than a theory of value derived from a supposed process of free competition is a theory derived from the actual alternatives between which individuals must choose under all the circumstances of time and place. This is, indeed, the court's theory of value—not pain, or pleasure, or cost of production, but "What is he 'up against' as his best alternative?" It is, indeed, from this common everyday theory of value held by everybody that the court derives its theory. It may be unreasonable, but it is

reality. The judicial mind, like all other minds, reads intention, or purpose, into the minds of participants in transactions, but the court goes further and investigates the circumstances within which a choice of alternatives is made by each party to the transaction. The "historical" school of economists had been doing the same empirically but not theoretically.

A heterodox line of economists was approaching, during the nineteenth century, a similar theory of value based on choice of alternatives. The germ was found even in Adam Smith's concept of "labor saved," which, however, he made equivalent to "labor pain" and "labor power." But the theory was elaborated in the decade of the 1840's by the American economist Henry C. Carey, and in the 1890's by H. J. Davenport.<sup>4</sup>

Thus, by substituting a theory of value based on choice of actual alternatives for one based on pain, or pleasure, or labor, the economic theory of value unites again with the legal theory of value. It is a behavioristic theory of the human will in action, a volitional theory of acting by choosing between accessible alternatives—not a hedonistic or materialistic theory that dominated traditional economics of the nineteenth century.

From another source, besides corporation finance, the so-called "scientific management" of the past forty years, came a distinction in the meaning of value which has been in process of introduction into economic theory. The early economists distinguished use value from exchange value. They excluded use value because they looked upon it as subjective and, therefore, immeasurable. But "scientific management" gives measurable dimensions to use value. Anything that can be reduced to a common unit of measurement is "objective," however "intangible" or "subjective" it may appear to be. Use value is measured in two ways: as a physical quantity and as a rate of output of that quantity. One is "static"; the other is "dynamic." As a static quantity it is a bushel



of wheat, a ton of pig iron, and so on, with well-known units of measurement. As a dynamic process, or rate of output, it is measured by the man-hour, the kilowatt-hour, and so on. Early physical economists used the man-year, the man-month, the man-week, reduced by Karl Marx to the man-hour, as their measure both of the process of valuation and of the amount of "embodied labor," or "real value," contained in all commodities and physical capital. They rejected money and its equivalent negotiable instruments as a measure of value, because of the instability of their purchasing power. Money for them was only a metallic output of labor whose value was measured by a more stable unit, the average of man-hours required to produce it. In this way they measured, not use values which, for them, were subjective, but relative exchange values as the relative number of man-hours required to produce and market the various products.

It turns out, therefore, that with the advent of scientific management, coupled with the recognition of negotiable instruments equivalent to money, economic theory employs two units of measurement—the man-hour and the dollar. These units measure two different meanings of value which now can be distinguished as use value and scarcity value. They, therefore, require two meanings of transactions; namely, managerial transactions whose output is use values, and bargaining transactions whose incomes are derived from relative scarcity values. Briefly, these two principles are efficiency and scarcity, whose valuations are expected use values and scarcity values.

The two kinds of transactions have always been recognized in law and in the ethical psychology employed in law. The employee who enters a factory submits himself to the commands of his superior. He has no freedom of choice. He must obey. Command and obedience are the law of managerial transactions. They are the legal basis of efficiency.

But before he enters the factory he agrees, or is assumed to

agree, upon the terms of the bargain. These terms depend upon the relative scarcity of jobs and applicants at the time. But the corresponding ethical relation, or negotiational psychology, employed in law is persuasion or coercion. If there is equality of opportunity, that is, free alternatives on each side, then the agreement is persuasive. If there is inequality of alternatives, that is, freedom of choice on the one side and oppressive alternatives on the other side, then the agreement is coercive. The measurement of values here agreed upon, persuasively or coercively, is the measurement of relative scarcity values in terms of the unit of money. The history of the law of labor relations shows a development in decisions through the past century gradually eliminating coercion and supporting the reciprocal persuasions of the willing buyer and willing seller.

These decisions turn on the meanings of property and scarcity. Property in law is scarcity in economics. If any useful object, such as air or water, the most useful of all, is so abundant that there is no competition for its acquisition, then that object does not become property. Rights of property are asserted and adjudicated only in useful objects that are scarce or expected to be scarce.

It was this identity of property and scarcity that led the court, in the last decade of the century, to enlarge the meaning of property from the ancient "corporeal property," meaning the use value of physical objects to their owner, to "intangible property," meaning the expected prices or rates to be charged by the new "public-utility" corporations for their services. Corporeal property is expected use value. Intangible property is expected scarcity value. For a state or federal government to reduce prices charged by a private owner is a "taking of property" just as much as is a "taking" of the physical object itself. The one takes the scarcity value of the property, the other takes the property itself. Hence it is the older "exchange value" of the property, which is its relative scarcity value, that becomes property. Under the Constitution, it

cannot be taken by governments without "due process of law" as determined by judicial decision.

This scarcity value was always implied in the common law and many precedents could be found for the new concept of intangible property, but it did not stand out as scarcity value separable from use value until corporations as going concerns definitely took the place of individuals as owners. "Corporeal" property is use value for individuals or corporations, but "intangible" property is relative scarcity value in buying and selling on the markets. The two are inseparable, but use value refers specifically to production and consumption, while scarcity value refers specifically to buying and selling, dogmatically known in economics as the "natural law" of supply and demand.

This "intangible" property had to be distinguished from the older "incorporeal" property. Each is "intangible" in the sense that each looks for its present value, or present worth, to the future. And each is made by law negotiable or assignable, like money or commodities. But incorporeal property is the obligation of debtors to pay in the future, while intangible property is the liberty of buyers in the future to buy or not buy, and of sellers to sell or not sell, except at a price or value that may be agreed upon or judicially determined. The typical intangible property is the "good will" of a going business.

Hence the double meaning of two words that split economic schools for a hundred years is dissected and then rejoined on the principle of futurity. Property means futurity as well as scarcity. The two words with double meaning are "commodity" and "exchange."

A commodity, in economic theory, was a *physical* object which was *owned* and *exchanged*. The double meaning was physical and legal—i.e., "corporeal property." The distinction between law and economics was not noticed, because both the material thing and its ownership change together, as when the ownership

of a colt grows into the ownership of a horse, or the ownership of pig iron into the ownership of structural steel. When it came to the ownership of the incorporeal property of debts, the debt was also classed with other commodities. Hence the early economists found no place in their theories for "credit." It also was treated as a commodity, like a physical thing owned and exchanged. They could explain the changes in prosperity and depression only in the psychological terms of optimism and pessimism. But these were immeasurable, hence popular but not scientific. Afterwards they became measurable in the term "intangible" property in law equivalent to purchasing power in economics. These change greatly in prosperity and depression, and the changes can be measured.

These complexities resolve themselves into the legal and economic meaning of a "transaction," distinguished from an "exchange." The materialistic economists looked on an exchange as a reciprocal delivery of physical objects. It was a labor process. But a transaction, both in business and law, is an alienation and acquisition of ownership. It is a legal process. The transaction creates two debts, a debt of performance, or physical delivery of the object, and a debt of payment in legal-tender money or its equivalent. The futurity of either debt may be so short that the interval of time is not worth measuring, or it may extend over days, months, or years. Whatever the interval, the transfer of ownership must be made, in law, explicit or implied, *before* the one who acquires physical possession is free to do as he pleases with the physical object of ownership. Otherwise he is a thief. Consequently, when we buy or sell we do not merely exchange corporeal objects, as had been the economic theory; *we buy or sell their ownership*, as has been the legal theory. The price, or value, which we pay or receive is the price paid for release of ownership, not the price of the object owned.

These two debts, negotiable or assignable, created by a trans-

action and operation of law, are measurable: first, as a debt of performance, that is, physical delivery of a quantity of use value at a time and place, say a thousand tons of pig iron or other commodity or service with well-known physical units of measurement. Second, as the price of each unit, say \$20 per ton, which is its scarcity value measured by the legal-tender unit, the dollar. The multiple of the two is a future value, \$20,000. Third, as a present value, determined by two discounts of future value; namely, the interest or waiting discount, of, say, sixty days, and the profit or risk discount. If this double discount for interest and profit is made at the rate of six per cent per year or one per cent for 60 days, then the future value of \$20,000 is a present value of \$19,800.

This formula of present value or present worth is elementary enough, but, applied to economics and law, present value is a multiple of use value, scarcity value, and discounted futurity value in a lawful bargaining transaction. Indeed, the entire process is a legal one, since the present value is derived from a double transfer of *ownership*—not from an exchange of physical objects. The physical objects—corporeal property—of the early economists, however, do not disappear; they are moved into the near or remote future when delivery or payment will be made. The transaction is “closed” when the two debts have been lawfully released by the actual performance and payment.

So it is that, after a hundred and sixty years of divorce, from the time of Bentham and Blackstone to the gold-clause decisions of the Supreme Court of the United States, the legal and economic theories of value are joined by changing the measure of value from corporeal weight to legal-tender negotiable paper.

It might seem that the changing economic theory is absorbed by the changing legal theory. But it is not so. The explanation of the union is in the new concepts of time and relativity. Corporeal

property remains, but it is shoved into the future. The physical economists looked to *past labor* for an embodied accumulation of value in the present commodities. The hedonistic economists looked to an ever-present but ever-moving *point of time*, between the incoming future and the outgoing past, for their sensations of pleasure and pain and their emotions of value. The institutional and legal economists look to *future* values discounted to present values.

These valuations are in the field of capitalistic economics. The future values to which they look are in different fields of economics, after legal control has been obtained. These are the engineering economy of augmenting the forces of nature by manpower and the consumption economy of obtaining the maximum happiness from limited resources lawfully acquired. The union of the three economies and their different valuations into a single whole of political economy, on the principles of time and relativity, is found in the economic principle of limiting and complementary factors and the legal-economic principle of strategic and routine transactions. The past now becomes the source of ethical and legal *justifications* in support of present claims, but the future becomes the source of present *valuations* of the claims themselves.

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NOTES

<sup>1</sup> Russell Briggs, formerly Assessor of Incomes, Wisconsin Tax Commission; Research Analyst for the Federal Bureau of Public Roads (Mss.).

<sup>2</sup> COHEN, REASON AND NATURE (1931).

<sup>3</sup> The history of these changes in law and economics have been discussed in detail in COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924), and COMMONS, INSTITUTIONAL ECONOMICS (1934).

<sup>4</sup> Cf. *id.* at pages listed in index for Carey, Henry C., and Davenport, H. J.

# ROMAN LAW AS THE BASIS OF COMPARATIVE LAW

HESSEL E. YNTEMA

## I

THRICE Rome gave laws to the world and bound the nations in unity: once by the force of arms, when the Roman legions established the supremacy of the Republic, in the unity of the Roman state; once again, after the Roman Empire had been dismembered, in the unity of the Church; and still a third time, through the reception of Roman law in western Europe, in the unity of law. This observation, with which von Jhering commences his great work, the *Geist des römischen Rechts*,<sup>1</sup> throws into relief one of the chief intellectual elements in the development of western civilization. For more than twenty centuries the law of Rome, alongside of Hebrew religion and Greek philosophy, has been one of the cardinal threads in that history, symbolizing its substantial unity. As one of the greatest Romanists of our time has observed, "Roman Law, next to Christianity, was the greatest factor in the creation of modern civilization, and it is the greatest intellectual legacy of Rome."<sup>2</sup> In a comparative view of the life of law, and not least in modern times when Roman conceptions have been submerged, as it were, in the subconscious levels of our legal thinking, it is apparent that the significance of this legacy can scarcely be overestimated.<sup>3</sup>

"The history of the venerable system of the civil law is peculiarly interesting. It was created and gradually matured on the banks of the Tiber, by the successive wisdom of Roman statesmen, magistrates and sages; and after governing the greatest people in the ancient world, for the space of thirteen or fourteen centuries, and undergoing extraordinary vicissitudes after the fall of the western empire, it was revived,

admired and studied in modern Europe, on account of the variety and excellence of its general principles. It is now taught and obeyed, not only in France, Germany, Holland, and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and the St. Lawrence."<sup>4</sup>

So Chancellor Kent observed in 1826. The list is by no means complete; at the present time, among other jurisdictions within the sphere of influence of the civil law, Italy, Spain, and Japan may be counted, as well as the South American republics and various parts of Africa.

Before considering specifically the role that a system of jurisprudence of so great historic significance should occupy in the comparative study of law, a few preliminary observations, relating to more or less obvious circumstances, deserve to be noted.

## II

In the first place, it is to be remarked that, although there have been perhaps some sixteen legal systems in the world,<sup>5</sup> only two of these can be described as dominant types; namely, the Roman and the English. Between them, states Lord Bryce, these two systems "cover nearly the whole of the civilized, and most of the uncivilized world. Only two considerable masses of population stand outside—the Musulman East, that is, Turkey, North Africa, Persia, Western Turkestan and Afghanistan, which obey the sacred law of Islam, and China, which has customs all her own."<sup>6</sup> It is this situation which inspires those who conceive that the mission of comparative law is to prepare the way towards greater uniformity in private law to seek in a more complete mutual understanding of the Roman and English systems of jurisprudence the eventual basis for such an evolution.<sup>7</sup>

In the second place, the law of Rome possesses unique significance as a common source of legal conceptions. There could be



no evidence more indicative of the viability and appropriateness to later conditions of the system created by the Roman jurists than its perpetuation, Phoenix-like, centuries after the dissolution of the Empire, in the medieval and modern civil law. True, nowhere and at no time were the classical principles preserved in the *Corpus Iuris Civilis* accepted complete and unaltered. The assimilation, even in the countries where the Roman law was formally adopted as the subsidiary *ius commune*, was partial and biased; the ancient doctrines were interpreted or even misinterpreted to suit contemporary needs and fused in kaleidoscopic combinations with native institutions and conceptions. True again, a variety of factors, aside from the superior refinement of the Roman *ius scriptum* as contrasted with local customs, contributed to the reception—the apparent universality of that law; the superstitious reverence for ancient authority; the instinct to imitate, abetted in this case by a natural preference, in the interest of economy of thought, for a developed system of ideas over cruder alternatives, as well as by the symbolic prestige of Rome; not to mention motives of political expediency; and, perhaps the most important circumstance of all, the fact that Roman law was taught in the universities. As Maitland has observed, “Law schools make tough law.”<sup>8</sup> The propagation of ideas is no unusual phenomenon; in the case of the reception of Roman law, however, the process spread over so long a period, occurred under conditions so diverse, and involved the assumption of so extensive a stock of ideas, not merely alien but ancient, as to constitute one of the most momentous and puzzling problems in the history of culture. It is not necessary to unravel the complex causation of the riddle to suppose that the central condition was a certain quality in the Roman law itself, due, one might suppose, to the energy that went into its development.<sup>9</sup> The residual fact is the reception.

The formal adoption of the Roman law as a *ius commune* was but an incidental aspect of the reception. Even in Great Britain and the United States, it may be remembered, although the civil law as such has never been received as a formal source of law (except in jurisdictions such as Scotland and Louisiana), there have been creative moments when law was under the spell of Rome; indeed, there were two points in English legal history when the civil law almost was formally received.<sup>10</sup> The relationship between the Anglo-American common law and the law of Rome is a moot historical problem, yet to be thoroughly investigated. What can be stated, however, is that, as the result of a silent acceptance of ideas, more penetrating than a formal reception could be, the basic ideas as to legal system and terminology and the common legal conceptions, particularly of the law of property and commercial relations,<sup>11</sup> only less obviously in English and American law than in the continental European systems, lead back to Rome. In this sense, there is perhaps an underlying truth in Chief Justice Tindal's fulsome tribute to the civil law as "the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe."<sup>12</sup>

For our purpose, then, the significance of the reception of Roman law, understood in a wide sense, lies, first, in the creation of a great body of continental law, serving, alongside of the feudal law, the canon law, and the law merchant, to unify the diverse legal systems of a great part of western Europe;<sup>13</sup> second, in the dissemination thereby of a stock of systematic legal conceptions and principles not merely in the civil law but to some extent also in the so-called common law systems; third, in the further penetration of this stock of conceptions through its initial acceptance as the basis of international law by Grotius and his successors;<sup>14</sup> and fourth, in the fact that the language of Roman

law approximates a "*lingua franca* of universal jurisprudence," the historical antecedents of which lie in the dusty tomes of medieval civilians and canonists and their successors, the writers on natural law and moral philosophy and the more modern pandectists, from which technical legal theory has chiefly been derived. The significance of Roman law in the modern world is historical rather than immediately practical; it rests, as Maine suggested, in "the immensity of the ignorance to which we are condemned by ignorance of Roman Law."<sup>15</sup>

In the third place, the law of Rome is an historical product, not, as it was once conceived, a fixed *quantum*, unchanged and unchanging. It has taken time to discover the significance of this fact, time together with the recognition of relativistic theories in science and jurisprudence and the almost complete codification of the so-called modern civil law. In ancient times, the belief of the conservative and eminently practical-minded Roman jurists in an ideal *ius naturale*, the supposed prototype of the law which they were creating, was no more disturbed by the evidences of legal evolution, however profound, than they have embarrassed the analogous widespread conviction of practical Anglo-American jurists that their common law is "the perfection of reason."<sup>16</sup> Rome, we are told by Mommsen, is a masculine nation that does not look back to the days of its infancy. Later, in the reception and application of Roman doctrines to contemporary conditions, the glossators and their successors, down to the nineteenth-century German pandectists, were at heart scarcely more critically inclined towards the law that they were called upon to interpret. How, indeed, could they deny the system to which they had recourse for practical ends?

Meanwhile, until relatively recent times, neither legal philosophy nor intensive historical research seriously challenged the spell of the civil law as "a collection of written reason."<sup>17</sup> To be sure, the Reformation and the correlated spread of the Bodinian

doctrine of national sovereignty in the sixteenth and succeeding centuries undermined the authority of the Holy Roman Empire and consequently deprived the *Corpus Iuris Civilis*, regarded as imperial legislation, of that wavering sanction, but the status of Roman law was no more than superficially affected. It really obtained *non ratione imperii sed imperio rationis*. Accordingly, on the one hand, the Grotian school of natural law and the subsequent Age of Enlightenment, though conceiving of law primarily as reason and partly as usage, in fact actualized the rational law typically in Roman conceptions. Likewise, on the other hand, legal history presupposed the value of the Roman materials.<sup>18</sup> For example, the great humanistic, historical school founded by Cujas and his associates in the sixteenth century undertook the restoration and exegesis of the classical Roman texts; the purpose was, as defined by Cujas in the dedicatory epistle to the first book of his *Observationes et Emendationes*, to purify the law from the erroneous interpretations which had crept in—*ut et complures alii Juris nostri loci mea opera omni ex parte perpurgentur, et a turpibus mendis vindicentur*.<sup>19</sup> The lively critical disputes which were started, chiefly by this work of Cujas, were exclusively directed to problems of textual criticism, to the determination of the so-called *emblemata Triboniani*.<sup>20</sup> But the conception of reviving the classical jurisprudence by eliminating the *barbaries doctorum* was, from the viewpoint of contemporary conditions, misconceived. As Flach has observed,

“Les lois romaines dont les *purifiez* voulaient de nouveau introduire l’usage répondaient à une organisation politique et à des conditions sociales vieilles de plus de mille ans, et puis leur étude était si longue et si compliquée qu’à peine la vie d’un homme pouvait-elle y suffire.”<sup>21</sup>

More recently under Hegelian façade, the positivistic tradition has been exemplified by the German historical school of the nineteenth century. Basically, the central theory of this school

as formulated by Savigny and Puchta, that law is an expression of the *Volksgeist*, a species of folklore, is romantic, uncritical realism. And, as Pound notes, "Savigny was a Romanist and his faith in the historically discovered Roman idea made his legal science quite as universal as that of the adherents of natural law."<sup>22</sup> For this reason, we need not marvel too much how the school of Savigny was bewitched by Roman forms and sought to satisfy the scientific thirst for the real law through idealization of the law of Rome. As a practical consequence, the monumental historical researches of the school of historical jurisprudence led by Savigny, repeating the positivistic error of the humanistic school of the sixteenth century, were devoted to the apparent object of restoring the *usus modernus pandectarum* of nineteenth-century Germany to the pristine Roman ideal. In short, as these examples may suggest, both reason and history have until quite recently conspired to sustain the myth that the Roman law is, if not the law, at least the law *κατ' ἐξοχήν*. Thus has Cicero's celebrated prognostic been perpetuated:

"Quantum praestiterint nostri maiores prudentia ceteris gentibus, tum facillime intellegitis, si cum illorum Lycurgo et Dracone et Solone nostras leges conferre volueritis, incredibile est enim quam sit omne ius civile praeter hoc nostrum inconditum ac paene ridiculum."<sup>23</sup>

Whether the prognostic be true, positivism has tended uncritically to take for granted. Doubtless, the background of the slow progress towards a scientific critique of the civil law (and one might add of the Anglo-American common law as well) has been the correspondingly slow sophistication of scientific ideas generally. But, in jurisprudence, there has been the special difficulty that the data are ordained and the purpose is assumed to be normative. Thus, the reception of Roman law in Europe, as of the English law more recently in North America, although it

greatly stimulated the exploration of the sources received, did so by premising their intrinsic authority and at the price of their interpretation biased by contemporary needs. Consequently, its basic purpose and data fixed, so-called legal science tends to be a literary and speculative tradition in jurisprudence and a professional interpretation of history, vacillating perforce between the unity of idealized ancient authority and the ephemeral immediacy of diverse local practice. The function of normative jurisprudence is to canalize the transmission of tradition and, for this reason, it is hardly congenial to independent critique of the positive law.

The circle, fortunately, is by no means vicious. Even in the nineteenth century, the union of legal science and practice, which reached a sort of apogee in the German *Pandektenrecht*, harbored incompatibilities. The historical school itself, perhaps by very reason of its intransigent Romanism, spurred out a Germanic branch which too romanticized ancient forms and institutions, but in this case of the early Teutonic laws. A related development, which, however, challenged the nationalistic implications of the historical school, was the stimulus given to the comparative study of primitive legal institutions by the work of Maine, Kohler, Post, and others, this in turn being connected with current linguistic and anthropological research. From another quarter, from Montesquieu, Spencer, and Comte, the idea of naturalism in social and legal science was patiently working in the direction of a more authentic positivism, not romantic with its data prescribed by authority, but scientific with its data to be ascertained by critical techniques. The effect of all this was to produce a crisis in the romantic premises of nineteenth-century positivism. Meanwhile, despite the ineffectuality of idealistic legal philosophy, the rational *motif* proceeding from the Age of Enlightenment was holding its own, if merely on account of the

irrelevance of historical research. In the face of the dominant positivism of jurisprudence, the nineteenth century was an era of legislation, codification, and social reform, which suggested another avenue of comparative study, *i.e.*, of current legislation. The truth is that, even under a conservative theory, the living law must laboriously develop in conformity to new social requirements—if necessary, surreptitiously, “in the interstices of procedure,” by fiction or by equity, or more overtly by legislative patchwork—until the accumulated mass of doctrine, precedent, and statute becomes so enormous, so palpably artificial, that it is sought to sweep it away, if needs be by a code. Yet even by a code it is not really swept away; the former principles are restated in perhaps simpler or more explicit terms, supposing the former law. But a code gives a breathing space in which the logic of the judicial process can commence anew.

Herein lies the peculiar significance of the modern European codes, which, by depriving the Roman law as such of its last vestiges of formal authority as a received *ius commune*, have removed to a more tolerable distance one of the chief impediments to the fundamental naturalistic study of historic legal phenomena—to wit, the obsession of the normative. It has become possible, even in civil law jurisdictions, to conceive of the law of Rome not as a transcendental or romantic unity, not as the law, but as a law or rather an evolutionary system of legal conceptions, the significance of which is due, as Wenger has suggested,<sup>24</sup> to the repeated reproduction and adaptation to new periods and peoples of a fluctuating stock of legal conceptions, a substantial portion of which has evolved from the classical period of Roman law into the modern codes and other parts of which have been from time to time discarded, revamped, or, as circumstances have required, revived until the residue has acquired the character of an internationalized *ius gentium* indiffer-

ent to time or locality. The resultant differentiation of the historic materials of legal science from positive authority constitutes a great gain, which may prove well-nigh as important as that accomplished by the differentiation of law from theology, and not merely because the modern codes are too recent and too various in their nationalistic origins to command so durable a superstition as has surrounded the Roman law in its guise as a *ius commune*. The significant thing is that by codification the inextricable confusion of so-called legal science with the normative application and interpretation of law is perceptibly lessened for the time being, and the inchoate tendencies towards a more adequate legal science can accordingly be more fully realized. Which is to say that the science of law, even if predicated upon the facts as to social tradition crystallized in custom, precedent, or legislation, may under such circumstances be perceived to involve the critical, independent determination and verification of those facts by comparative and historical research, and not merely the dogmatic formulation and communication of the tradition predefined as authority. Among the materials of legal science so conceived, it is apparent that the manifestations of the civil law, in both Roman and later times, justly claim a central place.

### III

From the preceding remarks, the more obvious circumstances that condition the relation of the historic materials of the civil law to comparative jurisprudence may be collected. These circumstances are: first, the dominance of the civil law, alongside of the Anglo-American common law, in contemporary legal systems; second, the persistence of legal conceptions of Roman derivation not merely in the modern civil law but also, to an unascertained degree, in the Anglo-American common law; and



third, the evanescence of the conception of Roman law as the received *ius commune*, in consequence of the almost entire codification of the modern civil law. It has also been suggested that the last circumstance has drawn a line between tradition and positive law in the civil law jurisdictions, which should encourage the development of a more specialized and, therefore, more effective legal science. It is plain, in view of the foregoing circumstances, that the significance of the Roman law to comparative jurisprudence is historical and, moreover, that it is presumably large.

It is now pertinent to examine the implications of this background more precisely. These may be considered, first, with reference to the general question what comparative jurisprudence has to do and, second, more specifically from the viewpoint of the study of Roman law.

As a prelude to these inquiries, it may be well to exorcise certain misconceptions, which have in part been inherited from, and are in part a reaction against, the traditionalism of nineteenth-century jurisprudence, and which offer obvious impediment to objective investigation. The first is that instance of provincialism which is constituted by the conception of law as a national or local unity. This conception, so largely characteristic of modern legal science, is a legacy from the nineteenth century. The typical theory of the jurisprudence of the past century, that law is local custom, had two principal implications: on the one hand, in reaction against the mere rationalism of the Age of Enlightenment, the traditional aspect of law was formally emphasized, albeit, in actuality, the nineteenth century was also an era of active legislative experimentation; on the other hand, in response to the increase of national sentiment, it was assumed as a major premise that law is territorial. As von Jhering stated the situation in a well-known passage: "Die Wissenschaft ist zur

Landesjurisprudenz degradirt, die wissenschaftlichen Grenzen fallen in der Jurisprudenz mit den politischen zusammen. Eine demüthigende, unwürdige Form für eine Wissenschaft!"<sup>25</sup>

It can scarcely be said that this situation has recently improved; perfervid nationalisms, the diversity of laws and tongues, the normative preoccupations of legal instruction, as well as the very exigencies of practical jurisprudence, have, if anything, exacerbated the political divisions of legal science. The modern reaction against the traditionalism of nineteenth-century jurisprudence typically accepts its major premise, the territorialism of law. And this, despite the fact that, as Vinogradoff has noted, "the mystic nationalism of the Romantic theory has not stood the test of critical examination and scientific progress."<sup>26</sup> Indeed, we cultivate law preëminently, not as the application of justice to human affairs, as an *ars boni et aequi* such as the Roman jurisconsults affected, nor as a practical science, *e.g.*, as the rational science of social ends contemplated by Holmes,<sup>27</sup> but as a science of local practice, as an enforcement of the particular institutional scheme with which we are familiar, though in theory the conception of a common law embracing historically or politically related jurisdictions is preserved as a more universal ideal. The fact is that the modern era has not been distinguished by that resignation which, as Wenger has remarked, the comparative study of law supposes.<sup>28</sup> The revival of interest in comparative jurisprudence during the past generation is the culmination of a tender, tentative effort, in the face of the geographical disunity of modern legal systems, to reformulate for legal science a basis which is not necessarily provincial. It is obvious that without such a basis the science of law, in any true sense of the term, must be grotesquely limited.

The second misconception to which reference may be made is that excessive modernism which denies that it has a past or, less

extremely, conceives each generation sufficient unto itself. This is another species of provincialism, in this case chronological, which is only partly exculpated as a repercussion of the undue traditionalism that has been in some measure perpetuated from the conservative theories of nineteenth-century jurisprudence. But the reaction overshoots the mark. True it is, as has indeed been suggested above, that the grave charges of antiquarianism and opposition to reform have with some justice been laid at the door of the dominant school of historical jurisprudence of the nineteenth century, which interpreted legal history as the unfolding of a fatal, national necessity. This thesis obviously did not serve the austere, objective rule of scientific inquiry. The remedy for the romantic attitude of historical jurisprudence, obsequiously bound to local tradition, however, is not an equally romantic modernism; what is required is, rather, as Holmes has inculcated,<sup>39</sup> a more intelligent and critical use of historical materials.

It is apparent that the implicit thesis of modernism does not survive analysis. It denies on simple *a priori* grounds that there can be significant sequences in history, or even (unless it be anthropologically minded) any substantial uniformities in human experience that deserve observation. It supposes that contemporaneity is the ubiquitous criterion of relevance in social science; that an abyss divides today from history. Yet it is obvious that the facts upon which social and legal science is predicated must be historical, and that, consequently, the only possible issue of the kind is whether there is some arbitrary criterion, measured solely by the lapse of time, to define the relevance of experience to current problems. Clearly, however, the chronological relation is superficial. Time is but a category, useful, for example, in historical exposition to dispose in sequence the march of events, and it is absurd to imagine, as modernism seemingly does, that the

only possible or even the most informing aspects of historical data consist of their temporal concurrences. There are respects in which Augustan Rome may be thought nearer to present Manhattan than the culture of the Andaman Islands, the medieval feudal regime, or even the colonial frontiers of the nineteenth century. As Maine has cogently observed:

"Sometimes the Past *is* the Present; much more often it is removed from it by varying distances, which, however, cannot be estimated or expressed chronologically."<sup>30</sup>

And there is the further consideration that memory alone lends meaning to perception. The availability of facts as to the immediate past does not impart to them significance. Facts do not interpret themselves by mere multiplication or, as some suppose, by a sort of phenomenological confrontation; they are formed in preconceived categories which it needs history to understand. Particularly in the domain of law. As Holmes has emphasized, historical study is still the primary part of the rational study of law; "it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth" of legal rules.<sup>31</sup> Which is to say, in Baudouin's phrase, *Sine historia caecam esse jurisprudentiam*. In short, the part of flaming modernism (or shall we say realism?) is to revolt against the incubus of blind tradition in law, not to attempt to deprive legal science of essential data.

In sum, the two conceptions of legal research that have been noted have a partial justification, the nationalistic conception in the professional requirements of jurisprudence and the modernistic in perceived needs of reform. In each instance, the practical motive makes the concept influential. These conceptions may, nevertheless, be disregarded in the ensuing discussion, since it is also clear that they are calculated to constitute prejudicial

limitations to a legal science that seeks first the truth about law. The relation of so-called comparative jurisprudence to such a science now requires brief attention.

#### IV

In the scientific study of legal phenomena, data to verify the suppositions suggested by observation may be sought in one or more of four possible sources, *viz.*, experimentation, quantitative observation, historical precedent, or comparative analogy. The first method of verification, by experiment, though occasionally conceivable, is not as a rule feasible; apart from the obvious consideration that it is infrequently possible to turn the requisite institution, and only under the most extraordinary conditions a legal system, into a laboratory of justice, it is difficult even under such circumstances to establish simple and sufficiently controllable conditions of experimentation. Consequently, scientific hypotheses as to law for the most part have to be verified by repeated observation, under conditions calculated to support inferences as to the influence of possible variables, rather than by experiment.

Where types are established by repetition, quantitative or statistical observation, if needs be supplemented by more detailed case studies of the typical situations, is a feasible method of recording and ascertaining the facts of repetition, and, by analysis of the results, norms of frequency can be established and variations therefrom described. The quantitative method has, however, certain specific limitations. Quite apart from the appreciable difficulties connected with the definition of simple, statistically manipulable, and at the same time significant categories for quantitative analysis, the determination of frequencies by such analysis rather reveals than resolves questions as to their interpretation and actual import. Moreover, it is apparent that the

quantitative method is appropriate only to such types of legal events as are readily identified as such and as occur at convenient times and places for recordation and then with sufficient frequency to permit reliable quantitative conclusions to be drawn, and, more especially, that the determination of frequencies in data thus obtained, however adequate the statistical base may be, will not permit the common factors in the data, which may be of the highest significance, to be segregated. This last consideration is of special immediate importance owing to the limitations of the available statistical information as to law, in respect of both time and place, and the want of comparability in what is available.<sup>32</sup> While for this reason the collection of more adequate statistical information as to legal phenomena is requisite for the future progress of legal science in various directions,<sup>33</sup> it remains necessary, in view of the actual and intrinsic limitations of such information, to rely very largely upon less representative documentation and, in any event, to have recourse to historical or comparative methods of verification.

As distinguished from the quantitative method, which commonly assumes the significance of observed frequencies as such, the historical and comparative methods rely typically upon qualitative comparison. In essence, both these methods involve what has been termed the process of *recoupement*, i.e., the verification of theories, initially suggested by observation of a particular legal situation, by analogy to partially comparable situations presenting appropriate variations in the factors to be ascertained.<sup>34</sup> If, in the process, the reference is to historical legal materials, it is normally intended that they be taken from the records of the legal system in the *milieu* of which the theory to be verified arose; on this account, legal history has the further function, which, it has been noted, is of primary importance, to give content and precise definition to particular legal conceptions. If, on the other

hand, the method is comparative, it is supposed that data will be sought to verify theory in the experience of some other, *i.e.*, a foreign, legal system or systems. The basis for these procedures assumes, in the former case, sequence of legal tradition and social behavior; in the latter, parallelism in the development of legal institutions and systems. In both cases, the object is to identify the incidental conditions and thus to define the common elements, in legal phenomena.

If, as the preceding remark suggests, the historical and comparative methods in their application to law are distinguishable chiefly by the data which they employ, they are to be regarded as mutually supplementary. "The characteristic difficulty of the historian," Maine has observed, "is that recorded evidence, however sagaciously it may be examined and re-examined, can very rarely be added to; the characteristic error of the direct observer of unfamiliar social or juridical phenomena is to compare them too hastily with familiar phenomena apparently of the same kind."<sup>35</sup> In these predicaments, reciprocal aid may be found, in comparison to cover the *lacunae* of historical data, in history to correct precipitate observation of alien institutions. It is to be added that, whereas for the reason intimated in the quotation a comparison of ideas or institutions cannot intelligently be made without the light of their respective histories, there is another respect than that indicated in which legal history requires in turn comparative data. The very circumstance that renders history essential to the understanding of law, *i.e.*, its specificity as to particular institutions, disguises those peculiar traits of national or geographical derivation which commonly characterize the evolution of individual legal systems. These idiosyncrasies, which the localized history of each system tends to assume, are explicitly revealed only by comparison. The truth is that, if

jurisprudence is blind without history, legal history will almost inevitably be myopic without comparative law.

In concluding these brief methodological observations, intended to locate the function of comparative study in legal science, three incidental remarks deserve to be made. The first is that, properly speaking, there is neither a comparative jurisprudence nor a comparative law. The latter term, it hardly needs to be stated, is a palpable misnomer for comparison of laws. Of the former, it is to be said, as C. K. Allen has pointed out, that there is no specific comparative jurisprudence, since science, whatever method it may resort to, is essentially comparative.<sup>36</sup> The terms are nevertheless useful to designate types of information which could with profit be more extensively employed in legal research.

In the second place, as may already have suggested itself, there is no fundamental disparity between quantitative and qualitative methods of inquiry; their differences derive principally from the character of the data collected and the corresponding mechanics of manipulation. Indeed, the quantitative method has been most effectively employed upon an historical or comparative basis so as to ascertain trends or effect comparisons in distinct bodies of statistical data. Conversely, it is to be anticipated that the reciprocally related historical and comparative methods of legal research will be enriched or facilitated by the use of statistical materials or techniques, where they are pertinent. The distinctive features and correlative possibilities of each method are characterized by its selection of data.

A third point is to be noticed in this connection. The inclusion of relevant data of allied social sciences within the area of legal study or even the examination of the actual operation, as contrasted with the theoretic dogma, of legal principles can scarcely be said to constitute distinct modes of inquiry. By such develop-



ments, the materials available for the determination of legal problems are enlarged, but the processes of verification that have been enumerated—by occasional experiment, by count of frequency, by genetic derivation, by analogical comparison—remain applicable. This circumstance, however, does not diminish the vital significance of such potential extensions of legal science. Indeed, the cardinal fault of traditional jurisprudence, conceived as a science, lies precisely at this point, or, in other words, in the artificially limited margin of experience upon which it is based. Typically, this margin has been constituted, on the one hand, by the confines of individual legal systems and, on the other, by positive law; only in part, and more in former days, did the forms of a *ius commune*, Roman or English, enable jurisprudence to surmount the ancient political landmarks of law.<sup>37</sup> This situation, as inimical to the objective development of legal doctrine as to the science of law and fundamentally attributable to the prevailing positivism of jurisprudence, its normative predilections, establishes the contemporary importance of both comparative and actualistic investigation of legal phenomena. In these two directions lie the most likely sources for the development of an adequate scientific jurisprudence or an effective critique of existent law.

## V

The foregoing account has been deliberately foreshortened in order to emphasize the position of comparative studies in legal science. It may in addition be remarked, on the one hand, that legal history, which is above portrayed primarily as a process to verify legal theory, more usually is found variously described as a mere impersonal finding of recorded fact, an imaginative re-incarnation of the past in literary form, or an interpretation of some principle of progress—in other words, as technique, art, or

philosophy, rather than science. Such conceptions, Rankeish, Macaulayesque, or Hegelian, have their place, but it is auxiliary in legal science. On the other hand, in conjunction with the general significance of comparative law, other more specific functions are commonly emphasized. To complete the present outline, the more important of such more immediately utilitarian motives for the comparative study of law may be briefly noticed.

### 1. *Understanding of Local Law*

Holmes once remarked that "The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself."<sup>38</sup> This observation, which shrewdly reflects the prevailing conceptions of legal instruction, particularly in the United States rampant with vocational pedagogies, raises the very vital question how the bottom of a subject is to be reached. The answer given by Holmes in the profound and prophetic address on "The Path of the Law" was: first, to pursue dogma into its highest generalizations in theoretical jurisprudence; second, to trace its evolution in history; and third, "finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price."<sup>39</sup> This conception of the evaluation of ends as the ultimate object of professional legal study has proved fruitful,<sup>40</sup> but it does not seem impertinent to point out that the conception still leaves the matter somewhat *im Stich*. Must the consideration of legal rules by reference to their ends be a purely speculative process? Or can aid be summoned?

It is in this conjunction that, in addition to legal history, comparative study is appropriate. Even for purely professional purposes such study of a subject can scarcely fail to give new insight into familiar conceptions, just as travel to strange countries vivi-

fies the perception of accustomed local surroundings. To quote an exceptionally qualified witness, M. Pierre Lepaulle, who, after preparing in law and sociology in France, took the undergraduate law course at Harvard:

"When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation. If I may state a personal experience, I never completely understood the French law before coming to the United States and studying another system. History of law seems inadequate to give to the student this sense of relativity, because in history we often deal with forces which are not yet dead, which still unconsciously bend the mind of the student in a certain direction. To see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study any phenomena of our own country. That is why comparative law should be one of the necessary elements in the training of all those who are to shape the law for societies in which every passing day brings new discoveries, new activities, new sources of complexity, of passion, and of hope."<sup>41</sup>

This testimony has most interesting implications for professional legal training, which there is no occasion here to explore. It may be noticed, however, that it indicates a practical motive, incidental perhaps from a strictly scientific point of view, which is calculated to hitch comparative law neatly to the present highly professional criteria of the academic study of law.

## *2. Understanding of Foreign Law*

However envisaged, the study of comparative law supposes some knowledge of foreign law, knowledge that has practical as well as cultural value. International trade, investments in foreign jurisdictions, international litigation in its various forms, as well

as the multiplication of intergovernmental agencies and relations, as is often pointed out, increasingly develop occasions in which an informed appreciation of, if not technical proficiency in, foreign law is advantageous and indeed frequently requisite. In such situations it is neither expedient nor always practicable to rely exclusively upon foreign counsel; the medium of intelligent decision on each side is mutual understanding of foreign legal doctrines and conceptions. Similarly, in the branch of municipal law that deals with so-called conflicts of laws, in cases involving specific reference to a foreign rule of law, awareness not merely of the superficial dissimilarities of legal principles but more particularly of the divergent denotations or qualifications of corresponding legal terms is essential to the proper application of the pertinent foreign rule of decision. For these various, specialized, practical purposes, arising out of international intercourse, it is apparent that an exclusively local jurisprudence is inadequate, even from the standpoint of the most narrow national interest, and that the requisite basis of understanding can most effectively be provided by the comparative study of law.<sup>42</sup>

### *3. Unification of Law*

In the development of national law, the disadvantages attendant upon diversity in local customs have, at different times and under varying conditions, normally been overcome or more or less effectively attenuated by the appearance or acceptance of a common law, usually favored by the central political authority. So it was in Rome, and so it has been in England, France, Germany, and other countries. In the United States during the past century, various factors contributed to harmonize the evolution of the laws of the several states; since at least the days of Kent, Dane, and Story, the professional legal literature and the dominant trends in legal instruction, as well as the common develop-

ment of doctrine in the courts and a degree of uniformity in legislation, have, through interpenetration of state law accelerated by increasingly extensive employment of the federal powers, emphasized the general ideas of the Anglo-American legal system, rather than the peculiarities of local practice or legislation, as a source of unity in law.<sup>43</sup> In this creation of a common law of the United States, comparative study, largely limited to the American and English sources, has had a significant role.

In Europe, the same causes of interdependence as have prevailed within individual states are also, though relatively feebly, operative among them. Until recently, the continent of Europe, from which the British Empire traditionally stood aloof, found in the afterglow of the received Roman law a sufficient legal unity. But when, at the commencement of the present century, the enactment of the German Civil Code had put a period to the last pretension of Roman law as a *ius commune* of Continental Europe, the conception of devoting comparative study to the common elements of European law assumed prominence, notably in the sessions of the first congress of comparative law, held at Paris in 1900. During the past two decades, the alliances occasioned by the World War, the creation of the League of Nations, and the coöperative foreign policy pursued by Great Britain have given impetus to and enlarged this movement towards mutual understanding, if not immediate unification, of the laws of Europe, a movement in which particular emphasis is laid upon comparative law as a basis for a *rapprochement* between the Romanist and Anglican legal systems.<sup>44</sup> In spite, perhaps even because, of the existing disunity among the nations of Europe, the common study of comparative law is envisaged as an instrument of international concord.

"Travailler au rapprochement des peuples en facilitant leur mutuelle intelligence," declares Lévy-Ullmann, "tel doit être aujourd'hui l'ob-

jectif essentiel, telle est l'utilité fondamentale des études comparatives.

"Sans cesser, dans l'ordre technique qui lui est propre, d'élargir le champ de ses investigations analytiques et de perfectionner la synthèse juridique dans les voies fécondes où l'entraînait mon vénéré maître Saleilles, la législation comparée doit tendre de toutes ses forces, dans le domaine plus vaste de la civilisation, dont elle est l'un des facteurs vitaux, à réaliser l'idéal de cette Paix universelle pour laquelle ont versé leur sang les meilleurs des nôtres, et à laquelle jamais les hommes de toutes les nations n'ont tant aspiré qu'aujourd'hui."<sup>45</sup>

The motives involved in this lofty conception appear to have a political as well as a practical tinge; *i.e.*, to cultivate a better basis of international understanding, to facilitate the solution of international disputes due to divergencies in points of view, and to unify commercial law in the interest of international trade. Inevitably, as the relations between nations increase and the international organs of justice grow in prestige, the significance of comparative law as a source of international unity will correspondingly become apparent.

#### 4. *Determination of Legislative Policy*

It remains to refer to what historically has been the chief motive of interest in comparative law. From the time when the pristine Romans sent a delegation to Greece to examine the laws of the Hellenic cities as a preliminary to the drafting of the Twelve Tables, to more recent days when proposed legislation is often motivated by consideration of analogous provisions in foreign legal systems,<sup>46</sup> one of the most fruitful sources of suggestion in the formulation of new laws has been foreign legislative experience. The need of acquaintance with current foreign legislation, especially as an auxiliary to the exercise of the legislative function,<sup>47</sup> has been recognized by the formation of the pioneer Société de Législation Comparée in France in 1869,<sup>48</sup> the English

Society of Comparative Legislation in 1895, the American Comparative Law Bureau in 1907,<sup>49</sup> and other institutions of like purpose. It is evident that this interest in foreign legislation is preëminently utilitarian in objective and closely related to the movements of legal reform which have dominated legislation during and since the nineteenth century.

It is obvious that reference to foreign legislation thus motivated involves certain dangers of superficial inference and even of inept imitation. Indeed, on this account, Esmein has suggested that comparative legislation should be distinguished from comparative law proper; as he indicates, the uncritical juxtaposition of the specific dispositions of different legal systems respecting given legal institutions, such as guardianship, the forms of security, etc., while it may furnish material ready-made to document proposed legislation, constitutes, from a scientific point of view "*seulement un supplément au droit national, un petit bagage additionnel de connaissances juridiques*," or, in other words, an unassimilated agglomeration of detail which is scarce worth the trouble.<sup>50</sup> The fact is that, even for practical purposes, a study of foreign legislation, without consideration of its historical antecedents and peculiar conditions and merely from the viewpoint of local jurisprudence, does not afford an adequate comparison of legal institutions.<sup>51</sup>

This point is implicit in Ames's suggestion that the systematic and comprehensive study of foreign law is the province of the legal scholar.<sup>52</sup> It is, however, most fully and effectively developed in the well-known critical work, *La Fonction du Droit Civil Comparé*, which Professor Lambert, the inspiring director of the Institut de Droit Comparé of the University of Lyons, published in 1903. In this work, the limitations of (a) conceptions confusing the study of foreign laws with comparative legal stud-

ies, (b) conceptions (such as have been noted above) that conceive of comparative law as a mere accessory to the study of national law, and (c) conceptions that subordinate the subject as an aspect of the theory of legislation, are indicated. In brief, the conception of a critical, comparative study of legislation, of a *droit commun législatif*, intended to supply a criterion for the examination of local law, is developed, in which the historical conditions and the social and economic implications of legal institutions shall be envisaged. As Lambert states:

"Cette discipline se propose de dégager de la comparaison, non pas des législations de tous les peuples du monde, ni même de tous les peuples civilisés, mais de celles-là seulement qui, comme les législations latines et germaniques notamment, sont rapprochées à la fois, par la similitude des états de culture et des conditions de vie économique qu'elles reflètent et par l'existence de nombreuses influences historiques qui se sont exercées simultanément sur les unes et les autres, les éléments d'uniformité juridique qui se rencontrent, au sein de cette communauté internationale limitée, derrière la diversité apparente des nombreux corps de droit positif."<sup>33</sup>

It is apparent that this conception of critical comparative study of legislation measurably accounts for the various motives of interest in foreign law, to which reference has been made. First, it emphasizes the common elements, rather than the nationalistic idiosyncrasies, in the comparable legal systems of western Europe. Second, it preserves the practical orientation which has characterized the comparative study of foreign legislation. As Lambert indicates,<sup>34</sup> the *droit commun législatif* furnishes a standard for the improvement of the respective positive laws in two directions; namely, by indicating obsolescent provisions which should be repealed or reformed and by suggesting those develop-



ments which will tend to secure greater international uniformity in law. Third, the conception envisages instruction in comparative law as a vehicle to enrich the present formal, nationalistic modes of legal training by directing attention both to the social conditions and to the common international elements of legal institutions.<sup>55</sup> Finally, by predicating the *droit commun législatif* specifically upon the results of scientific historical and comparative research, the dangers lurking in superficial reference to foreign legislation as a basis of reform are to be obviated.

This conception of comparative law as providing the basis for the critique of positive laws is of high interest in the present connection, if for no other reason than that it recognizes critical scientific research as the essential basis of systematic legal reform.<sup>56</sup> The motive, it is true, is eminently practical; it is directed to the interpretation and improvement of national law in the light of a scientific comparison of laws, and, for this reason, the *droit commun législatif* is characterized as a dogmatic discipline, as an art, which is to be distinguished from the descriptive science of comparative legal history.<sup>57</sup> But while the area of comparison and its objectives are thus defined by the practical motive, the method proposed is critical, predicated upon the data derived from scientific examination of a limited community of legal systems. If, consequently, this conception does not converge upon, at least it confirms the basic significance of comparative law as a mode of scientific inquiry.

## VI

It seems, therefore, appropriate and inevitable, even from the most practical of viewpoints, to conceive of the comparative study of law as a scientific enterprise. On the other hand, it is to be recollected that the scientific study of law, which necessarily involves the examination of representative data, must very largely

have recourse to comparative methods. As Munroe Smith has observed:

"Every true science employs a method of which the technical and professional schools make little use. This method is comparison. It is preëminently *the* scientific method; without the employment of the comparative method, no body of knowledge regarding the facts of the physical world or the facts of social life can take rank as a science. . . . A science of English law or of Anglo-American law is as inconceivable as a science of Anglo-American ethics or economics. It is, indeed, as unthinkable as a science of American physics, or mechanics."<sup>58</sup>

In the third place, as the preceding analysis will suggest, an adequate comparison of laws is predicated upon legal history; it is unsafe, if not futile, to draw superficial inferences from the comparison of mere general conceptions, shorn of their historical derivation, their specific applications, and the conditions of their adaptation. To quote a celebrated expression of Bufnoir:

"L'histoire du droit, peut-on dire, n'est qu'une des formes de la science du droit comparé, puisqu'elle rapproche les doctrines juridiques dans les états successifs d'une même législation. Et on peut dire également que la législation comparée est une forme de l'histoire du droit, puisqu'elle fait connaître les fortunes diverses qu'éprouvent les institutions juridiques dans les milieux différents. Si bien que les deux sciences pourront arriver à n'en faire qu'une seule, qui serait l'histoire des législations comparées."<sup>59</sup>

In sum, comparative law supposes the scientific analysis of historically ascertained phenomena.

In the light of these somewhat obvious considerations, the relations between Roman law and comparative legal studies can be indicated with relative brevity. As was pointed out in an earlier stage of this discussion, such significance as the law of Rome has

today is historical; it derives no longer from an attribution of present, positive authority to the *Corpus Iuris Civilis* by virtue of its reception as a subsidiary common law, but from its position in the evolution of legal culture and its filiation in the doctrines, the precedents, and the enactments constituting the monuments of that evolution. This by no means derogates from its scientific importance. If there could once be laid aside the positivistic notion that only the particular national law which happens to be formally recognized today is significant in each state, it would appear that the recognition of Roman law as historic Fact, not formal Norm, supposes the pertinence to scientific inquiry of the vast complexus of events and ideas which are subsumed. The law of Rome is not *the* law, but *a* law, the value of which to legal science depends upon the extent of its continuity, the variety of its experience, and its correspondent historical or international influence. And this is true of the law of every other time and place.

This comparative point of view has a twofold implication for the study of Roman law. In the direction of Romanist research, on the one hand, as has, indeed, already been intimated, it indicates avenues in which such research has been and may be advantageously extended. It has been amply demonstrated by the work of the historical school of the nineteenth century and their successors that the law of Rome is the embodiment of an evolution, which, during important intervals in history, has registered the growth of legal ideas—in the ancient world, typically as a central, imperial *ius gentium*; in more modern times, as a common conceptual technique for the communication of current notions of order and justice and their adaptation to circumstance. The codification of the civil law has removed the last excuse to conceive of this evolution upon a flat positivistic plane of received authority. As de Zulueta has observed, in speaking of the historical orientation of Romanistic studies:

"The leadership in Romanistic studies has in the nineteenth century belonged unquestionably to Germany, and it is no accident that the change in point of view has accompanied, without completely coinciding with, the supersession of Roman Law as law in force in Germany. Our interest in the *Corpus Iuris* thus consists in recovering from the harmonizing text of the compilers dogmatic differences between every age and every jurist, in underlining those discrepancies of thought, expression, and decision which, so long as the *Corpus Iuris* was considered simply as a Code, it was our object to suppress and explain away."<sup>60</sup>

In the result the study of the civil law has been broadened and enriched in various directions.

Particularly has this been true of the study of the classical Roman law, which, having become dominantly historical, is now in the process of becoming comparative. Without attempting to assess the present status of Romanistic research, which has been portrayed by other and more competent hands,<sup>61</sup> mere mention is made of the chief foci of inquiry, each emblematic of fascinating realms of specialized scientific investigation and revealing comparative problems of large historical significance. Thus, in the first place, the careful editing of the classical texts, which was in large part accomplished during the nineteenth century, has laid the basis for the contemporary intensive study (or sometimes, as some would have it, the pursuit) of interpolations, especially in the Digest, and with the progress of this type of investigation during the past half century not merely have special philological techniques been made available to identify the stages in the evolution of particular doctrines incorporated in the sources, but attention is increasingly attracted to a series of essentially comparative problems respecting the reciprocal relations between the Roman and Byzantine contributions to the final codification of Justinian.<sup>62</sup> In the second place, the epochal work of Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen*

*des römischen Kaiserreichs*,<sup>63</sup> opened the large and related field of inquiry as to the connections between the central law of Rome and the Hellenic and other provincial laws, a field which constitutes at the present time, owing to the rich discoveries of recent archeological excavation, a largely unexplored and highly promising area of investigation as to the laws of the ancient world. In this area, it is clear, the setting of the major historical problems beyond the preliminary editing of texts, which for some time will necessarily absorb first attention, is comparative.<sup>64</sup>

Aside from these two distinctive activities of Romanistic research at the present time—the identification of interpolations, which has become an essential method of textual and doctrinal interpretation, and the specialized studies of the papyri, inscriptions, and other relics of the provincial laws of the Roman Empire—mention should be made of a third and less extensive line of inquiry in which the validity of the comparative method has been specifically acknowledged; namely, the study of the origins of Roman law. In this area, it is obvious that the scanty available sources of information need to be interpreted and supplemented by reference to other primitive legal systems.<sup>65</sup> Finally, to refer to another and basic direction of comparative investigation, it may be suggested that analysis of the relations between contemporary social and economic conditions and the development of legal institutions and doctrines in the Roman Empire, along the lines adumbrated by Rostovtzeff,<sup>66</sup> offers possibilities which are as yet incompletely explored.

It may thus be said that the comparative point of view is being accepted in the study of the classical Roman law. So much, however, can scarcely be said to characterize the study of its post-Justinian development. In an illuminating paper, which was published shortly before his death, Munroe Smith remarked as to the evolution of law in central and western Europe: "The whole

movement has been European. And yet no writer has attempted to deal with it from this point of view. There are numerous histories of Italian law, of French law, of Spanish law and of German law. There are also histories of the legal development of many of the smaller European countries. But there exists no general history of European law."<sup>67</sup> This comment related especially to private law; it implicitly recognized that in certain specialized fields, e.g., of public law,<sup>68</sup> the value of comparative methods has been, for historical reasons, more adequately realized. It should also be added, perhaps, that the international interest in theoretical legal philosophies has furnished a general, if somewhat superficial, medium of scientific discussion less confined by national boundaries than the study of positive law. But, by and large, it remains that during the past century the development of law in medieval and modern times has been envisaged through the spectacles of the modern national systems of law. Legal history, as conceived by the historical school of the nineteenth century, follows the flag.

It would lead far afield indeed to attempt to notate this suggestion, but it may incidentally be remarked that even the study of the civil law as a received *ius commune* has in effect fallen between the stools of positivistic national jurisprudence and the effort of historical research to revive the classical law of Rome, more or less irrespective of its *sequelae*. In consequence, attributing due recognition to the intensive researches that have been directed by a handful of scholars to various common aspects of the evolution of the post-Roman civil law, it must be admitted that, relatively speaking, we have not progressed in our understanding of that evolution far beyond where Savigny left us in 1831 in the concluding volume of the monumental *Geschichte des römischen Rechts im Mittelalter*, a work limited in time to the Middle Ages and in scope to the formal juristic literature. It

is symptomatic that the outstanding projection of this treatise is a history of German legal science.<sup>69</sup>

In sum, the elaborate achievements of historical research during the past century, inspired by national sentiment for the local law, have largely ignored the common threads of continuity and the parallel phenomena of evolution, in the post-Roman law of Europe. Such division of labor, although dominated by a positivistic motive, has doubtless been justified as a necessary means to exploit the abundant recorded data. But, in view of what has been indicated above, it will scarcely need also to be emphasized that, to attain the scientific or even the practical objects sought through comparative legal research today, the great gap between the law of the *Corpus Iuris* and the modern national systems of law needs to be bridged by detailed investigation of the common developments of European law in medieval and modern times, to which Munroe Smith has drawn attention, as well as of the local variations. There is an embarrassment of riches for such investigation. What is principally required in this inviting and important area of comparative research is a more scientific analysis and synthesis of materials now mostly segregated as *disiecta fragmenta* amongst the several systems of European law.

## VII

It remains to consider very briefly a second implication of the comparative point of view in its bearing upon the study of Roman law; namely, the position that such study may justly claim in American legal science or legal education. In view of the preceding remarks, it may shortly be stated, in the first place, that comparative research, which in common law jurisdictions will notably comprise the Roman and later civil law as a central current in the evolution of European legal culture, constitutes, along-

side of or in conjunction with observational, quantitative, or historical methods, an essential mode of scientific inquiry. Is such study, in the second place, equally necessary for the practical purposes of positive national jurisprudence? Or, in the third place, from the standpoint of legal education?

With respect to the first of these questions, it must suffice to revert briefly to the several considerations that have been offered as practical motives for the contemporary interest in comparative law. If the observations that have been made above with respect to these various objectives of comparative legal study be recalled, it will be suggested: (a) that comparative examination of the antecedents of the present systems of European law, Anglo-American as well as continental, an examination which will involve consideration of the classic Roman law only less directly than the later manifestations of legal evolution within the orbit of western European culture, is essential to provide a common standard for the critique of the existing positive laws and the construction of a *droit commun législatif* as envisaged by Lambert; (b) that such inquiry is equally necessary as a basis for the effort to harmonize the dominant continental and English strains of legal development; (c) that, to lay the basis for an understanding of the basic conceptions of the modern civil law systems, undoubtedly the only common and the most economical avenue of approach is through the central doctrines derived from the law of Rome. Finally (d), it may be suggested, so far as the object of enlivening the perception of national law may be concerned, that the Roman law, while less completely developed in certain respects than the modern systems of civil law, presents the counter-vailing advantages of affording temporal as well as spatial contrasts, of a simplicity attained only by centuries of analysis, and of unique historical significance as the chief common source of



the fundamental legal conceptions of today. This last suggestion, it will be remarked, inevitably leads into the question of the placement of Roman law in American legal education.

It is apparent that the answer to this question depends upon the accepted standards and ideals of legal education. In an essay which appeared some forty years ago, Munroe Smith, whose distinguished attainments in comparative law peculiarly entitled him to pass upon the question, distinguished three appropriate functions of a law school: (1) to provide the essential *technical* preparation for future lawyers; (2) to provide a *professional* education for prospective members of a public profession; and (3) to provide *scientific* training in law. After indicating that the study of Roman law has limited value as technical preparation, is advantageous but scarcely imperative as a part of professional education, but is indispensable as a basis of scientific legal study, he suggested that, if the objects of legal education be deemed to include the inculcation of the scientific spirit and the advance of legal science:

"I think it must be recognized that some knowledge of Roman law should be required from every candidate for a law degree; and that advanced elective courses should be established in European legal history and modern European law for the few who desire to devote themselves to the widening of the borders of legal science."<sup>70</sup>

The scientific conception of legal education lying at the basis of this suggestion was by no means novel. It formed, for instance, a major presupposition of the Langdellian reforms of the methods of legal instruction, initiated at the Harvard Law School in 1870. As President Eliot noted, "Professor Langdell's method resembled the laboratory method of teaching physical science, although he believed that the only laboratory the Law School needed was a library of printed books."<sup>71</sup> Likewise, earlier, in the

formative stages of legal education in the universities, the scientific conception appears to have been held as an ideal. For illustration, it is appropriate to turn, on the occasion of the centenary of New York University School of Law, to the inaugural address of its first distinguished principal, Benjamin F. Butler, who, among other public services, had taken so large a part in the drafting of the Revised Statutes of New York State,<sup>72</sup> as delivered at the opening of the School in 1838. It is observed in this address:

"The Law, rightly understood, is one of the noblest of the moral sciences. But to be thus apprehended by its professors, they must study it as a science. . . . 'The law is unknown to him,' (said one of the oracles of the Profession,) 'who knoweth not the *reason* thereof.' Unless, therefore, the Law, like other sciences, be taught by a detailed and systematic explication of its principles, it will degenerate into an art, or at best, into a mere compilation of positive rules; and he will be the greatest lawyer, not who has the largest understanding and the most commanding genius, but he who has the strongest memory, and the greatest aptness and dexterity in the use of forms."<sup>73</sup>

This conception has been commonly accepted; as so frequently occurs, not the ideal, but the mode of its realization, has constituted the crucial problem of legal education.

In considering this problem in the present connection, it is worth recollection that there was a time when it would not have been surprising that plans of legal education, conceived from this high scientific point of vantage, should, in their development, have proved hospitable to the comparative study of law, particularly of the law of Rome in its classic and later forms alongside of the law of Westminster. On the one hand, there was a lively practical interest in the civil law, which, as Pound has remarked, had substantially vanished by the middle of the nineteenth century.<sup>74</sup> In an address before the Suffolk bar in 1821,

Story referred to the Institutes and Pandects of Justinian, as follows:

"The whole continental jurisprudence rests upon this broad foundation of Roman wisdom; and the English common law, churlish and harsh as was its feudal education, has condescended silently to borrow many of its best principles from this enlightened code. The law of contracts and personalty, of trusts, and legacies, and charities, in England, has been formed into life by the soft solitudes and devotion of her own neglected professors of the civil law.

"There is no country on earth which has more gain than ours by the thorough study of foreign jurisprudence. We can have no difficulty in adopting, in new cases, such principles of the maritime and civil law, as are adapted to our own wants, and commend themselves by their intrinsic convenience and equity. . . ."<sup>75</sup>

For some time after the Revolution, on the other hand, there existed a definite and, in view of the then condition of English jurisprudence, a not unnatural antipathy towards the contemporary law of England. This attitude is, for example, reflected in the inaugural address of Benjamin F. Butler cited above, wherein that law is taken to evidence "that a system of jurisprudence originally imbued with a noble spirit of equality and justice, may yet become, in the lapse of ages, and under the controlling influence of aristocratic institutions, intolerably voluminous, intricate, and artificial, and in many respects, exceedingly partial and unjust."<sup>76</sup> In view of these circumstances, it was but appropriate that the early post-Revolutionary proposals for the development of legal education within the universities, such as the abortive scheme for the organization of Columbia University in 1784,<sup>77</sup> Hoffman's *Course of Legal Study* of 1817,<sup>78</sup> and the course in law outlined upon the opening of the University of Virginia in 1825,<sup>79</sup> should have included provision for instruction in the civil law.

The initial interest was accordingly favorable to the auxiliary cultivation of the civil law in the universities of the United States. In the subsequent progress of legal education, it might have been anticipated that a country which has placed liberal facilities at the disposal of science, which has exhibited a high degree of curiosity and inventiveness in various of the arts, whose people combine the cultural backgrounds and traditions of the several nations of Europe, and the very multiplicity of whose institutions has provided a prolific machinery for social and political experimentation, should have formed a singularly fruitful milieu for the development of comparative law. But the development has long been retarded. As Simeon E. Baldwin has observed, except in Louisiana, the Roman law, "with occasional exceptions, such as that offered by Hugh S. Legaré, of South Carolina, John Pickering, of Massachusetts, and John Anthon, of New York," has "received almost no attention from the practicing American lawyer, and little from the American law student, during the first three-quarters of the nineteenth century."<sup>80</sup> In fact, systematic instruction in Roman law and comparative jurisprudence was not offered in the law schools until the introduction of the broad course of graduate study at Yale in 1876, the organization of the School of Political Science at Columbia in 1880, ensuing upon Theodore Dwight's opposition to liberalization of the legal curriculum, and, in 1910, the institution of a required course in Roman law as part of the fourth-year graduate curriculum at Harvard. But these and similar developments came too late to affect the basic legal curriculum, fortified in its intensive nationalistic and technical introversion by the contemporaneous advent of the case method. Consequently, the courses in Roman and comparative law were either, as at Columbia, placed as electives in an increasingly crowded curriculum or, as at Yale and Harvard, relegated to the somewhat adventitious program

of graduate study. Despite these efforts to develop the study of comparative law in this country, it is not too much to say that, in comparison with the curricula and contributions of other leading nations during the past half century, including Great Britain, the educational policies of the law schools of the United States, in this area of humanistic inquiry, have remained until very recently the most exclusively nationalistic and technical, and the contributions of American legal scholarship relatively the least significant.

In accounting for the technical specialization of American legal education, Morris R. Cohen has recently suggested that "even our law schools have in their organization and curricula been dominated not by literary and speculative, but by the narrowly practical, tradition from the time they were in effect trade schools. Those that were connected with universities were so only nominally or administratively, not culturally."<sup>81</sup> This stricture undeniably characterizes the result of the development of American legal education, at least until very recently; nevertheless, it is unjust in several particulars. First, it does not account for the then relatively liberal plans for instruction in law in the leading American educational institutions of the early nineteenth century; second, it does not acknowledge the notable position that the university law schools have occupied, from the time of Kent and Story, in the creation of American law, an enterprise which has been by no means exclusively professional in conception or accomplishment; and, third, it does not explain why the dominant law schools, located for the most part in universities, have, during the phenomenal scientific expansion of these institutions since the Civil War, fallen upon an epoch of cultural isolation.

It would be presumptuous here to attempt an explanation. But it may be intimated that the following factors, among others, have contributed to the result. The first is the prevalence of apprenticeship methods of legal education during the Colonial period and later, methods which were necessitated by the disappearance of

systematic instruction in the common law at the Inns of Court in the seventeenth century and the failure of other educational institutions for a substantial period to supply an effective substitute. The second is the reception of the common law of England as the common heritage of the American people.<sup>82</sup> The third is the influence of the first really successful American law school model, the Litchfield School, which, imitated in the initial developments at Yale and Harvard, contributed to fix in most important quarters a narrow and exclusively professional basic conception of the scope of the legal curriculum.<sup>83</sup> The fourth is the policy, usually followed in the universities until quite recently, of recruiting law school faculties from among active members of the bench and bar and of financing legal instruction on an independent fee basis; this necessarily loosened the relations between the law school faculties and the universities in which they were located and placed legal instruction in a position of financial dependence upon the current demands of the profession. The fifth is the concentration of scholarly activity in the law schools, during the first half of the nineteenth century, upon the formulation of a national law and, after the arid generation succeeding the Civil War and the rejuvenation of legal education by the case method, its inevitable absorption in the realization of this intensive mode of education, substantially limited in scope at the outset to the Litchfield curriculum, whose preëemptive demands upon the time of instructor and student have been accentuated by the multiplication of specialized technical courses permitted by the elective system, and, particularly, by the progressive increase in the prodigious mass of case material, well-nigh surpassing the capacity of this method of instruction to assimilate.

Over a hundred years ago, the suggestion was made:

"While, then, we are endeavoring to advance the *science* of law in our own country, particularly by the means of law schools and lectures on the *common law*, we ought at the same time to take care that the

*civil* law should not be wholly neglected. We have just had an illustrious example of professional liberality in the donation made by our learned countryman, Dr. Dane, to the University of Cambridge, for the advancement of *American* law. And we earnestly hope, that some benefactor of equal liberality will soon be found, who will devote a portion of the well-earned fruits of an honorable life to a chair for the civil law in that ever-cherished institution. This would complete the department of jurisprudence in our university law school, and at once give it the preference over every other.<sup>184</sup>

It is a matter of speculation what the course of American legal education might have been had the hope embodied in this suggestion been realized in due time. This much, however, is clear: first, that in the institution to which reference is made and which has so largely influenced the conceptions of legal instruction in this country, notably during the past half century, the hope was long deferred—in effect, until 1910, when it was incompletely realized through the institution of Roman law as a required subject in the graduate curriculum;<sup>85</sup> and second, that, consequently, the field was left open for Dane's astute plan to utilize legal education as an instrument for the creation of a national American law. This plan stated an obviously needed and relatively liberal ideal for the 1820's, and, it need scarcely be added, has since been amply realized by the efforts of Story and his successors. But, unfortunately and very possibly without initial design, the task has been so absorbing as to leave little room in the basic law curriculum for anything more than the requisite specialization within the limits of the original conception of Nathan Dane.

In the result, American legal education has come to be, until very recently at least, almost exclusively occupied with the transmission and development of national law, conceived at once as a common ideal and as existent positive doctrine, a function which

has necessarily involved intensive comparative study of the precedents and laws in force in the numerous jurisdictions of the United States. It has, in other words, occupied a position intermediate between the view of the mere practitioner and that of legal science, and, in this respect, involves a certain basic inconsistency. This circumstance, however, contrary to what might have been anticipated and in no small degree on account of the very merits of the intensified methods of instruction and research which are in vogue, has served, not to facilitate, but rather to postpone and to increase the practical difficulties involved in efforts to liberalize the curriculum. Here, too, the good tends to be the chief enemy of the best. But for this it might be more obvious (1) that a modicum of historical and comparative study should be required of every law-school student as an integral part of his instruction in law and (2) that appropriate instruction in Roman law is specifically indicated in Anglo-American jurisdictions as a basis for more specialized comparative study of the evolution and current phenomena of European law.<sup>86</sup> Doubtless, under existing conditions, the accomplishment of these *desiderata* will appear to some to involve practical difficulties. Such is the case not merely of comparative studies but also of the other directions in which, it is becoming increasingly obvious, the study of law needs to be broadened. It is tempting in such a situation to temporize, to measure the possibilities in terms of existing institutional structures and positivistic prejudices, and it may be expected that expansions will follow lines of lesser resistance, at least for a time.<sup>87</sup> Eventually, however, it may be recognized that the objective to be sought is not, as is often implicitly assumed, the adjustment of evident needs to the limitations of the extant curricula, but the satisfaction of the substantial requirements of liberal legal education and legal science, if necessary, by reform of these curricula.<sup>88</sup>



## NOTES

<sup>1</sup> VON JHERING, *GEIST DES RÖMISCHEN RECHTS* (5th ed. 1891).

<sup>2</sup> Buckland (1931) *J. Soc. Pub. Teach. Law*, 25.

<sup>3</sup> To quote from Maine's classic essay, *Roman Law and Legal Education*,

"Even though, therefore, it be true—and true it certainly is—that texts of Roman law have been worked at all points into the foundations of our jurisprudence, it does not follow, from that fact, that our knowledge of English law would be materially improved by the study of the *Corpus Juris*; and besides, if too much stress be laid on the historical connexion between the systems, it will be apt to encourage one of the most serious errors into which the inquirer into the philosophy of law can fall. It is not because our own jurisprudence and that of Rome were *once* alike that they ought to be studied together—it is because they *will be* alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we in England are slowly, and perhaps unconsciously or unwillingly, but still steadily and certainly accustoming ourselves to the same modes of legal thought and to the same conceptions of legal principle to which the Roman juriconsults had attained after centuries of accumulated experience and unwearied cultivation." *VILLAGE COMMUNITIES IN THE EAST AND WEST* (7th ed. 1913) 332–333.

This suggestion of Sir Henry Maine was expressed in 1856 and, therefore, was put forth without benefit of the most substantial achievements of historical legal research in the detailed developments of the English common law, the Germanic laws, the various systems of oriental law, as well as of the Roman law itself. In the light of the myriad diversities which have been revealed by eighty years of historical exploration, it is doubtless oversanguine, oversimplified, and insufficiently recognizant of those indigeneous, irrefragable elements which constitute the peculiarities of law. These elements have caused the hope of an eventual reconciliation of the legal systems of Europe, except in those areas where commercial considerations strongly argue for uniformity, to appear to most contemporary observers highly remote.

It may, nevertheless, be remarked that the hypothesis of the comparability of Roman and English law, implicit in the suggestion of Sir Henry Maine, is of fundamental significance in the development of the comparative study of law. To illustrate: The hypothesis, for example, lies at the basis of Pound's well-known and suggestive theory of the developmental stages of legal rules and doctrines considered in terms of their objectives, a theory the basis for which is found primarily in Roman and the later civil law, on the one hand, and in the evolution of English and American law on the other. See Pound, *The End of Law as Developed in Legal Rules and Doctrines* (1914) 27 *HARV. L. REV.* 195–234. A more specific and extremely interesting survey of the internal comparability, *i.e.*, the spiritual similarities, of English law and the classical Roman law (as distinguished from the Byzantine reformulation) is to be found in the recent article by Pringsheim, *The Inner Relationship between English and Roman Law* (1935) 5 *CAMBRIDGE L. J.* 347–365. Pringsheim's essay is in effect a detailed exemplification of von Jhering's suggestion that,

"Die englische Jurisprudenz athmet bei all' ihrer Unbekanntheit mit der römischen fast denselben Geist wie die altrömische. Dieselbe Handhabung der Form, dieselbe Pedanterie, dieselben Unwegen und Scheingeschäfte; selbst die Fiktionen fehlen nicht." VON JHERING, *op. cit. supra* note 1, at 315.

Without endeavoring to canvass the several aspects of this suggestion, reference may

also be made to the incisive development of the universality of juristic technique as an element which relegates to a "secondary plane of importance the formative influences which can properly be attributed to unsophisticated custom or to virgin national character," influences which the so-called School of Historical Jurisprudence has undoubtedly overemphasized, in Sir Maurice Amos's recent article, *The Legal Mind* (1933) 49 L. Q. REV. 27, 42.

It is also to be remarked that, perhaps with a more explicitly practical *motif*, the conception of a comparative synthesis of English with civil law materials has animated the more significant developments in the study of comparative law on the European continent since 1918. This, for instance, is a primary objective of the pioneer Institut de Droit Comparé of the University of Lyons. See LAMBERT, *L'ENSEIGNEMENT DU DROIT COMPARÉ. SA COOPÉRATION AU RAPPROCHEMENT ENTRE LA JURISPRUDENCE FRANÇAISE ET LA JURISPRUDENCE ANGLO-AMÉRICAINNE* (1919). It is worth notice in passing that, of the imposing series of thirty-odd monographic studies which have been published by the Institut under the scholarly and inspired direction of Professor Edouard Lambert, no less than two thirds are entirely or in substantial part devoted to the comparative study of English and American law.

The conception that has led to this emphasis in comparative legal studies has recently been expressed by Professor Lévy-Ullmann, the director of the analogous Institut at Paris, in his useful study of the tradition of English law, *LE SYSTÈME JURIDIQUE DE L'ANGLETERRE* (1928), as follows:

"Fronting jurists of the 20th century lies a two-fold task; in public law they must establish the organization of international relations, the first outline of which is visible today in the League of Nations; in the relations of private individuals, they must elaborate a body of uniform law to govern the business transactions between subjects of different states.

"This world-wide synthesis will be the product of the joint labors of the common lawyers and of the civilians. It will be the result of a happy combination, whether formed instinctively or advisedly, of the Anglo-Saxon and the Continental systems." [From the translation, *THE ENGLISH LEGAL TRADITION. ITS SOURCES AND HISTORY* (1935) 1, liii].

<sup>4</sup> 1 COMMENTARIES ON AMERICAN LAW (1826) 481.

<sup>5</sup> Wigmore, *A New Way of Teaching Comparative Law* (1926) J. SOC. PUB. TEACH. LAW 6, 7. The types recognized in this interesting description of the pictographic method of teaching comparative law, are these: Egyptian, Babylonian (Mesopotamian), Hebrew, Chinese, Hindu, Greek, Roman, Maritime, Japanese, Mohammedan, Celtic, Germanic, Slavic, Ecclesiastical, Romanesque, Anglican.

For the present purpose, Lord Bryce's suggestion that both the Canon law and the Romanesque systems established by the modern European codes, although incorporating alongside of Roman elements conceptions drawn from Germanic and other sources, are in their main lines and their fundamental legal conceptions Roman, is assumed. 1 BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* (1901) 92.

<sup>6</sup> *Id.* at 74.

<sup>7</sup> *E.g., id.* at 122, references *supra* note 3.

<sup>8</sup> MATTLAND, *ENGLISH LAW AND THE RENAISSANCE* (1901) 25.

<sup>9</sup> Thus, Maine states:

"The unrivalled excellence of the Roman law is often dogmatically asserted, and, for that very reason perhaps, is often superciliously disbelieved; but, in point of fact, there

are very few phenomena which are capable of so much elucidation, if not explanation. The proficiency of a given community in jurisprudence depends, in the long run, on the same conditions as its progress in any other line of inquiry; and the chief of these are the proportion of the national intellect devoted to it, and the length of time during which it is so devoted. Now, a combination of all the causes, direct and indirect, which contribute to the advancing and perfecting of a science, continued to operate on the jurisprudence of Rome through the entire space between the Twelve Tables and the reform of Justinian,—and that not irregularly or at intervals, but in steadily increasing force and constantly augmenting number." MAINE, *op. cit. supra* note 3, at 379.

It is, obviously, a large question in what, and in what degree, the superiority of the Roman law consists. Various opinions have been expressed. Savigny, for example, who regarded the substance of the Roman doctrines as relatively of minor importance, since they are predicated upon a modest core of moral judgments reproducible and paralleled in other systems of law, emphasized the form of the law as codified by Justinian, the superiority of the methods developed by the Roman juriconsults, their mastery over the leading principles of legal science, and the precision and conformity of their technical legal language to practical life. SAVIGNY, *VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (3d ed. 1840) 27 ff. As pointed out by later writers, however, this distinction between form and substance is superficial and unsustainable. The fact is that, in point of form as well as substance, certain portions of Roman law, such as the law of property and the law of obligations, have had a much more extensive influence than other and less satisfactory branches. Thus Stahl, in discussing the problem, attributes to the Romans the first definite differentiation of law from morals and conceives their chief contributions to be: first, the conceptions of the inviolability of the legal order and of the sanctity of private rights; second, in certain branches of law (especially the law of obligations), the analysis of the fundamental structure of legal institutions, in other words, of the nature of their subject matter in terms, not of a formalistic logic, as Hegel thought, or of the ultimate moral and social values with which legal philosophy is concerned, but of the intermediate, practical purposes of legal institutions. On the other hand, Stahl attributes the relative immaturity of other fields of law and especially of the Roman public law to the failure of the Roman jurists to evolve a positive principle of social organization. 2 STAHL, *DIE PHILOSOPHIE DES RECHTS* (5th ed. 1878) §§ 96-99, 509-521. (Anhang. Über den Werth des römischen Privatrechts.) Von Jhering, while acceding to Stahl's point of view, points out that the prior positivism has left the critical question substantially untouched and, in fact, cites this circumstance as the basis for undertaking the *GEIST DES RÖMISCHEN RECHTS*. 1 VON JHERING, *op. cit. supra* note 1, § 2, 16-25.

Without undertaking to express a direct opinion upon so large a question, the writer may perhaps be permitted to suggest that the difference of views indicated in the preceding paragraph is not so wide as von Jhering was inclined to assume. There is agreement upon the technical superiority of the Roman juriconsults, a quality which, it is interesting to remark, was not attended, any more than in the case of the creators of the common law, except by inchoate notions of general legal theory. This superiority consisted, among other things, as von Jhering has indicated in a famous passage, in the development of what may be termed a practical logic of legal conceptions and institutions, which is as superior to casuistic systems of jurisprudence as the alphabet is to a pictorial written language. 2 *id.* at 2, 334 ff. Necessarily, in this practical logic the social phenomena of the time were regarded, and for this reason the Roman forms also con-

tained an element of substance. And insofar as the Roman concepts reflected common social institutions, they enjoyed an equally wide basis of application. In this connection, it is to be remembered that the Roman law was denuded of a large share of the specifically Roman elements by its internationalization in the guise of a *ius gentium*, a process to which it was later again subjected by the civilians of the Middle Ages and by the natural law school. On the other hand, it is not to be thought that the basic moral content of the Roman law, which is what Savigny presumably had in mind, rivaled in influence the teachings of Christianity or even Greek philosophy in determining the value judgments of later centuries.

Maine's point, quoted at the beginning of this note, it may be remarked, takes on doubled significance if the energy devoted to the refinement of Roman legal conceptions by the numerous generations of subsequent scholars be considered.

<sup>20</sup> SENIOR, DOCTORS' COMMONS AND THE OLD COURT OF ADMIRALTY (1922) 3, II. Not to speak of the antiquated theory that the Roman occupation of Britain involved an original reception of Roman law. E.g., Finlason's introduction to 1 REEVES, HISTORY OF ENGLISH LAW (1869).

On the question of the influence of Roman upon English law, see further SCRUTTON, THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND (1885); GÜTERBOCK, BRACTON AND HIS RELATION TO THE ROMAN LAW (1866), translation by COXE; MAITLAND, *op. cit. supra* note 8, *passim*; VINGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE (2d ed. 1909) 97 ff.; WOODBINE, THE ROMAN ELEMENT IN BRACTON'S DE ACQUIRENDO RERUM DOMINIO (1922) 31 YALE L. J. 827 ff.; Oliver, *Roman Law in Modern Cases in English Courts*, in CAMBRIDGE LEGAL ESSAYS (1926) 242 ff.; MACKINTOSH, ROMAN LAW IN MODERN PRACTICE (1934).

With respect to the United States, Pound has drawn attention to the influence of the civil law during the formative early years of the nineteenth century, notably through the use of contemporary civil law treatises by Kent and Story. Pound, *The Place of Judge Story in the Making of American Law* (1914) 48 AM. L. REV. 676, 684 ff.; Pound, *Comparative Law in the Formation of American Common Law* (1928) 1 ACTA ACADEMIAE UNIVERSALIS IURISPRUDENTIAE COMPARATIVAE (1928) 183. Of course, the influence of civil law upon the development of law in the United States has been chiefly mediate rather than direct, *i.e.*, through the reception of the English common law, but the whole problem deserves to be more intensively considered. Incidentally, it may be thought that Maine's anticipation of a general reception of the civil law, as formulated in the Louisiana Code, was based upon a misconception. MAINE, *op. cit. supra* note 3, at 360.

<sup>21</sup> For a critical, scholarly study of Roman conceptions of property and possession and their representation in modern American law, the recent work by NOYES, THE INSTITUTION OF PROPERTY (1936), deserves particular mention in this connection. By providing an analysis of the Roman in contrast with the English, or feudal, conceptions of property, the author has done a real service to comparative law as well as to institutional economics.

<sup>22</sup> Acton v. Blundell, 12 M. & W. 324, 353, 152 Eng. Rep. 1223, 1234 (1843).

<sup>23</sup> Munroe Smith, *A General View of European Legal History*, in the volume of essays published under that title (1927) 3, 28 [reprinted from 1 ACTA ACADEMIAE UNIVERSALIS IURISPRUDENTIAE COMPARATIVAE (1928) 198, 219]; MUNROE SMITH, THE DEVELOPMENT OF EUROPEAN LAW (1928) 258 ff.

<sup>24</sup> E.g., Senior states that "For centuries the Roman civil law stood for the Law of Nations." SENIOR, *op. cit. supra* note 10, at 12.

<sup>15</sup> MAINE, *op. cit. supra* note 3, at 333.

<sup>16</sup> COKE, FIRST INSTITUTE (1791) 97b.

<sup>17</sup> 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (9th ed. 1783) 5.

<sup>18</sup> The historical study of civil law materials is, of course, primarily in mind. The suggestion that a positivistic attitude was accepted is, however, rather fortified than otherwise by the conceptions dominating the historical investigation of other legal systems. For example, the rise of interest in Anglo-Saxon and early English antiquities in the seventeenth century, which was, as Holdsworth suggests, primarily motivated by political considerations [HOLDSWORTH, THE HISTORIANS OF ANGLO-AMERICAN LAW (1928) 34], apparently supposed that the Anglo-Saxon was the golden age of the English common law, where occurred, to quote Blackstone, "the rise and original of that admirable system of maxims and unwritten customs which is now known by the name of the common law, as extending its authority universally over all the realm, and which is doubtless of Saxon parentage." (4 BLACKSTONE, COMMENTARIES, 412).

The attitude of legal history during the nineteenth century was not quite that naïve. But it is worth noting that, even to the present time, a relatively large proportion of historical research has been devoted to the investigation of legal origins. As late as 1897 we find Holmes, the author of THE COMMON LAW (1881), criticizing the prevalent positivistic attitude towards tradition:

"At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history." HOLMES, COLLECTED LEGAL PAPERS (1921) 186.

As Pound expresses it, the historical school "was not a historical school at all. It assumed legal history as an absolutely given datum." POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 19.

<sup>19</sup> 3 CUJAS, OPERA (Venice ed. 1758) 1.

"The legal history of Cujas, who has been spoken of as a precursor of the historical school," Pound suggests, however, "is a Humanist reconstruction of classical antiquity, as a part of the intellectual movement of the time, not an attempt to put historically found principles on the throne of Justinian." POUND, *op. cit. supra* note 18, at 8.

<sup>20</sup> For an interesting discussion of the disputes between Cujas and his contemporaries, involving chiefly the *emendationes* of Cujas, see the preface of Heinecius to the *Observationes et Emendationes*, reprinted in 3 CUJAS, OPERA, 733 ff. There is a brief summary of Cujas's method in Coleman Phillipson's biography of Cujas, GREAT JURISTS OF THE WORLD (1914) 83, 98 ff.

<sup>21</sup> Flach, *Les Glossateurs et les Bartolists* (1883) 7 NOUVELLE REVUE HISTORIQUE 205, 226.

<sup>22</sup> POUND, *op. cit. supra* note 18, at 19.

<sup>23</sup> *De orat.* I, 44, 197.

<sup>24</sup> Wenger, *Römisches Recht und Rechtsvergleichung* (1920) 14 ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE, I, 106, 17.

<sup>25</sup> 1 von Jhering, *op. cit. supra* note 1, at 15.

<sup>26</sup> I. VINOGRADOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* (1920) 134.

<sup>27</sup> E.g., *The Path of the Law*, in HOLMES, *COLLECTED LEGAL PAPERS* (1921) 187, 195.

<sup>28</sup> *Supra* note 24, at 107.

<sup>29</sup> HOLMES, *op. cit. supra* note 27, at 186.

"The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."

It may be suggested, in connection with the foregoing statement, that the rational study of law, insofar as it conforms to experience, will necessarily involve reference to historical data, the chief issues being the periods from which the data may be derived and the theory which shall control for the purpose of such reference. Holmes, in the foregoing passage, is presumably more concerned with the theoretical motive upon which law rests than with the potential employment of historical materials as a basis of information, as he adds that

"It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Ibid.*

<sup>30</sup> MAINE, *op. cit. supra* note 3, at 7.

<sup>31</sup> HOLMES, *COLLECTED LEGAL PAPERS*, 186.

<sup>32</sup> For discussion of the use of quantitative methods in legal research, see the suggestive article by Jaffin, *Prologue to Nomostatistics* (1935) 35 COL. L. REV. 1, and for the more specific problems connected with judicial statistics, OLIPHANT, *STUDY OF CIVIL JUSTICE IN NEW YORK* (1931); MARSHALL, *JUDICIAL STATISTICS* (1931); YNTEMA, *FACTS AND THE ADMINISTRATION OF JUSTICE* (1931).

<sup>33</sup> Cf. Yntema, *The Purview of Research in the Administration of Justice* (1931) 16 IOWA L. REV. 337; Yntema, *Legal Science and Reform* (1934) 34 COL. L. REV. 207.

<sup>34</sup> Cf. Lepaulle, *The Function of Comparative Law* (1922) 25 HARV. L. REV. 838, 852 ff.

<sup>35</sup> MAINE, *op. cit. supra* note 3, at 7.

<sup>36</sup> ALLEN, *LEGAL DUTIES* (1931) 12. In referring to supposed "kinds" of jurisprudence, Allen states:

"The cardinal error is to confuse the method with the essence and to consider any one kind as the only kind.

"For example, *comparative jurisprudence*. Its mode of operation is only an extension of the method of so-called 'particular' jurisprudence. Whether different systems of the same era are being compared, or individual institutions, or different periods of development in the same or different systems, the aim is to obtain data which lead inductively to juristic principles. The method of all sciences must be 'comparative' when the evidence upon which they depend is scattered over a wide area. In few, if any, of them is

the largest known area of observation yet coincident with the actual area. The term 'comparative' clearly denotes only the method of operation, not the end in view, for the process of comparison is employed not for its own sake, but in order to arrive at general conclusions."

To preclude misconception, it is perhaps worth noting that, in this passage, it is suggested that the different "kinds" of jurisprudence are distinguished by their respective methods, while, in the discussion above, the distinction is conceived to be constituted chiefly by the delimitation of the data employed. This apparent divergence is, however, only nominal, since in the above quotation the term "method" is used to denote two aspects which it seems convenient to distinguish for the purposes in hand; namely, the processes and techniques involved in the collection of data on the one hand, and, on the other, the processes and assumptions involved in the verification of theory. These aspects are intimately related and, where they do not need to be distinguished, may be conveniently described as "method."

<sup>37</sup> For more specific discussion, consult Yntema, *The Implications of Legal Science* (1933) 10 N. Y. U. LAW QUARTERLY REV. 279, especially at 295 ff.

<sup>38</sup> HOLMES, COLLECTED LEGAL PAPERS, 197.

<sup>39</sup> *Id.* at 198.

<sup>40</sup> Yntema, *Mr. Justice Holmes' View of Legal Science* (1931) 40 YALE L. J. 696, 703.

<sup>41</sup> Lepaulle, *The Function of Comparative Law* (1922) 35 HARV. L. REV. 838, 858.

<sup>42</sup> Lévy-Ullmann refers to this conception as characterizing what he terms the first stage in the orientation of comparative law, i.e., the period from 1869, when the Société de Législation Comparée was founded, to 1900, when the first congress of comparative law was held at Paris under its auspices. Lévy-Ullmann, *De l'Utilité des Études Comparatives* (1923) 1 LA REVUE DU DROIT 385, 388.

<sup>43</sup> Cf. Yntema, *The American Law Institute*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY (1935) 657, 661 ff.

<sup>44</sup> See especially LAMBERT, *loc. cit. supra* note 3, and also Gutteridge, *The Value of Comparative Law* (1931) J. SOC. PUB. TEACH. LAW 26; JENKS, *THE NEW JURISPRUDENCE* (1933) 63 ff.

<sup>45</sup> Lévy-Ullmann, *supra* note 42, at 398.

<sup>46</sup> Cf. AUCOC, *Les Études de Législation Comparée en France* (1889) 131 SÉANCES ET TRAVAUX DE L'ACADÉMIE DES SCIENCES MORALES ET POLITIQUES 108; MAAS, *Die Aufgabe unserer Vereinigung hinsichtlich des internationalen Austausches offizieller Drucksachen* (1896) 2 JAHRBUCH DER INTERNATIONALEN VEREINIGUNG FÜR VERGLEICHENDE RECHTSWISSENSCHAFT UND VOLKSWIRTSCHAFTSLEHRE ZU BERLIN 122; LAMBERT, *LA FONCTION DU DROIT CIVIL COMPARÉ* (1903) 892 ff.; and for an early reference see FOCLIX in (1834) 1 REVUE ÉTRANGÈRE DE LÉGISLATION ET D'ÉCONOMIE POLITIQUE 4, where reference is made to the contemporary English and French practices of consulting foreign legislation in the preparation of domestic statutes.

<sup>47</sup> This has been frequently emphasized; to cite two relatively early instances:

Thus, V. A. WAGNER, in outlining the plan of the ZEITSCHRIFT FÜR ÖSTERREICHISCHE RECHTSGELEHRSAMKEIT UND POLITISCHE GESETZKUNDE, stated in 1825 (vol. 1, Vorrede, ii):

"Der Practiker die Gesetzgebung des Auslandes kennen müsse, weil er durch unsere Gesetze . . . angewiesen wird, in manchen Fällen ein Rechtsgeschäft, dessen Form,

Inhalt und Wirkung, so wie die persönliche Fähigkeit der Fremden nach auswärtigen Gesetzen zu beurtheilen; der *Theoretiker* darin neue Nahrung für seine Wissenschaft findet; jene aber, welche im Gebiete der Gesetzgebung zu arbeiten berufen sind, dieser Kenntniss am dringendsten bedürfen, um auch das für das Vaterland benützen zu können, was die gesetzgebende Weisheit *fremder* Staaten als wohlthätig und heilbringend erprobt."

And, in a lecture on "The Alleged Uncertainty of the Law," delivered before the Boston Society for the Diffusion of Useful Knowledge, March 5, 1830, John Pickering stated:

"In this fortunate age we have such means of improving our own jurisprudence as were never before possessed; we can now bring together the laws of all other countries, and by a comparative study of principles see, more distinctly than our predecessors were able to do, the defects and excellencies of these and of our own." (1834) 12 AM. JUR. 285, 309.

<sup>48</sup> See AUCOC, *loc. cit. supra* note 46. As Laboulaye, the first president of the Société, stated in explaining its mission: "La comparaison des lois étrangères est une étude de législateur bien plus encore que de jurisconsulte." 1 BULLETIN DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE (1869) 4.

It may be of interest to note, incidentally, that the creation of the Société was prompted by English and American models, *viz.*, the English National Association for the Promotion of Social Science founded in 1857, with which the earlier Society for Promoting the Amendment of the Law, founded in 1844, was amalgamated in 1864 [cf. 1 ENCYC. SOC. SCI. 244 (1930)], and the American Association for the Promotion of Social Science, which was organized in Boston in 1865 in imitation of the English association [cf. AMERICAN SOCIAL SCIENCE ASSOCIATION, DOCUMENT PUBLISHED BY THE ASSOCIATION (1866) 11 ff.]. Both associations had departments dedicated to jurisprudence, which were particularly interested in legislative problems.

<sup>49</sup> Cf. 31 A. B. A. REP. (1907) 1001 ff. In the report of the committee recommending the establishment of the Bureau, it is remarked:

"We are passing through a period formative of an American system of jurisprudence which future historians will add to the list of great original systems, the Roman, the English, the Hindu, the Mohammedan, and the Chinese. This destiny cannot be fulfilled without a comprehensive acquaintance with modern legislation throughout the world coupled with a thorough knowledge of institutional law and its historical development. In this utilitarian and constructive age we are bound to recognize that juridic principles are confined to no one people nor to any single era: it is our mission to select from every source that which is best fitted to assure the prosperity and happiness of the American people." *Id.* at 744, 745.

<sup>50</sup> Esmein, *Le Droit Comparé et l'Enseignement du Droit* (1900), 29 BULLETIN DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE 373, 376. Cf. Esmein's later essay, *La Jurisprudence et la Doctrine* (1902) 1 REVUE TRIMESTRIELLE DE DROIT CIVIL 5, 17, in which, speaking apparently as a historian of law, he suggests that, while comparative law is of use to the legislator, it can scarcely be utilized as a basis for judicial decision or doctrine, expressing the historical, national law. This point of view, really resting upon the assumption that jurisprudence and doctrine do not involve the legislative function, is criticized with some justice by LAMBERT, *op. cit. supra* note 46, at 911 ff.

<sup>51</sup> Cf. Kohler, *Ueber die Methode der Rechtsvergleichung* (1901) 28 ZEITSCHRIFT



FÜR DAS PRIVAT- UND ÖFFENTLICHE RECHT DER GEGENWART 273, 281 ff. AUCOC, *L'Usage et l'Abus en Matière de Législation Comparée* (1892) 21 BULLETIN DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE 141.

<sup>52</sup> "The professor has, while the judge and the practicing lawyer have not, the time for systematic and comprehensive study and for becoming familiar with the decisions and legislation of other countries. This systematic study and the knowledge of what is going on in other countries are indispensable if we would make our system of law the best possible instrument of justice." AMES, *LECTURES ON LEGAL HISTORY* (1913) 451-452.

<sup>53</sup> LAMBERT, *op. cit. supra* note 46, at 895.

<sup>54</sup> *Id.* at 904 ff.

<sup>55</sup> "L'étude du droit civil comparé permet au juriste de profiter des expériences tentées à l'étranger; de se renseigner sur la manière dont les diverses réglementations données à une même matière par les législations des principaux pays de même civilisation se sont comportées à l'épreuve de la pratique; sur les mérites et les défauts que cette épreuve a révélés; sur les résultats économiques et sociaux de chacune de ces réglementations." *Id.* at 45. And see the later discussion of the educational features of the study of comparative law in LAMBERT, *op. cit. supra* note 3, and *L'Enseignement du Droit comme Science Sociale et comme Science Internationale*, introduction to VALEUR, *L'ENSEIGNEMENT DU DROIT EN FRANCE ET AUX ÉTATS-UNIS* (1928) vii ff.

<sup>56</sup> For discussion of the general issues as to the relations between the practical and the scientific study of law, see Yntema, *Legal Science and Reform* (1934) 34 COL. L. REV. 207, and Yntema, *supra* note 37, at 305.

<sup>57</sup> LAMBERT, *op. cit. supra* note 46, at 913. While Lambert conceives the object of comparative legal history to be "la connaissance des lois du développement de la vie juridique" and that of *droit commun législatif* to be the identification and enlargement of "le fond commun de conceptions et d'institutions" in the legal system compared (or, in other words, the creation of a common law), it would seem that the chief consideration involved in the distinction is the necessity of defining the area of comparative investigation. With some justice, he points to the meager results of too comprehensive comparative inquiry. His proposal is, therefore, in effect to limit the *droit commun législatif* to relatively comparable legal systems, leaving to comparative legal history the wider study of legal phenomena in all times and places. *Id.* at 919.

It may be suggested that it need not follow from such an advantageous limitation of the area of comparison that the *droit commun législatif* must be exclusively an art. From the viewpoint of the analysis which has been developed above and even perhaps from that of Lambert's cogent argument, it would be appropriate to regard this species of comparative law as comprising two branches, *viz.*, (a) a descriptive branch devoted to the common elements in the legal systems compared, and (b) an applied branch or art having the function of interpreting or suggesting modifications of the legal systems involved in terms of the results of scientific analysis.

<sup>58</sup> MUNROE SMITH, *A GENERAL VIEW OF EUROPEAN LEGAL HISTORY AND OTHER PAPERS* (1927) 263, 264.

<sup>59</sup> Bufnoir, presidential address, 20 BULLETIN DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE (1891) 65, 66.

<sup>60</sup> De Zulueta, *The Study of Roman Law Today*. Inaugural Lecture (1920).

<sup>61</sup> E.g., *ibid.* And especially WENGER, *DER HEUTIGE STAND DER RÖMISCHEN RECHTSWISSENSCHAFT ERREICHTES UND ERSTREBTES* (1927).

<sup>62</sup> The literature on interpolations is, of course, legion. The more important general

works are cited in KIPP, *GESCHICHTE DER QUELLEN DES RÖMISCHEN RECHTS* (4th ed. 1919) 161 n. 18. In the present connection, see especially, WENGER, *op. cit. supra* note 61, at 23 ff.; PRINGSHEIM, *Beryt und Bologna* IN *FESTSCHRIFT FÜR OTTO LENE* (1921) 204; COLLINET, *The General Problems Raised by the Codification of Justinian* (1923) 4 *TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 1; COLLINET, *ÉTUDES HISTORIQUES SUR LE DROIT DE JUSTINIEN. TOME PREMIER. Le Caractère oriental de l'Oeuvre Législative de Justinien* (1912); BUCKLAND, *Interpolations in the Digest* (1924) 33 *YALE L. J.* 343; RICCIBONO, *Fasi e Fattori dell' Evoluzione del Diritto Romano*, in 2 *MÉLANGES DE DROIT ROMAIN DÉDIÉS À GEORGES CORNIL* (1926) 235, 272 ff.; RICCIBONO, *Outlines of the Evolution of Roman Law* (1925) 74 *U. OF PA. L. REV.* 1, 11 ff.; LEVY, *Westen und Osten in der nachklassischen Entwicklung des römischen Rechts* (1929) 49 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE. ROMANISTISCHE ABTEILUNG* 230.

<sup>63</sup> 1891.

<sup>64</sup> Without attempting to refer to the large and specialized literature relating to the Greek, Egyptian, Babylonian, and other legal systems involved, Wenger's account, *op. cit. supra* note 24, at 33 ff., may be noted as a compact, comprehensive estimate of the progress which has thus far been accomplished.

<sup>65</sup> Wenger, *supra* note 24, at 1, 106, 138 ff. For a recent illustration of this type of study, see WESTRUP, *INTRODUCTION TO EARLY ROMAN LAW, II. Joint Family and Family Property* (1934).

<sup>66</sup> ROSTOVITZ, *THE SOCIAL AND ECONOMIC HISTORY OF THE ROMAN EMPIRE* (1926) 174.

<sup>67</sup> MUNROE SMITH, *op. cit. supra* note 58, at 3. Cf. Wigmore's remarks in the editorial preface to *A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS & MOVEMENTS IN CONTINENTAL LEGAL HISTORY* (1912) xxxiii. For a summary account of the development of European law from the point of view suggested by Munroe Smith, reference may be made to his lectures, posthumously published as *THE DEVELOPMENT OF EUROPEAN LAW* (1928).

<sup>68</sup> Cf. Ehrlich, *Comparative Public Law and the Fundamentals of Its Study* (1921) 21 *COL. L. REV.* 623.

<sup>69</sup> STINTZING-LANDSBERG, *GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT* (1880-1910).

<sup>70</sup> MUNROE SMITH, *op. cit. supra* note 58, at 266.

<sup>71</sup> Eliot, *Langdell and the Law School* (1920) 33 *HARV. L. REV.* 518, 524.

<sup>72</sup> Cf. BUTLER, *THE REVISION OF THE STATUTES OF THE STATE OF NEW YORK AND THE REVISERS* (1889) 18 ff. Cf. also the remarks of Marshall S. Bidwell in *Memorial*, 18 *N. Y.* 610, 611.

<sup>73</sup> *INAUGURAL ADDRESSES DELIVERED BY THE PROFESSORS OF LAW IN THE UNIVERSITY OF THE CITY OF NEW YORK, AT THE OPENING OF THE LAW SCHOOL OF THAT INSTITUTION* (1838) 9.

<sup>74</sup> Speaking of the possibility in the early nineteenth century of a reception of French law, Pound remarks:

"One who reads the older American reports, particularly those of the State of New York, cannot fail to notice the unusual number of references to the writers and authorities of the civil law which they contain, and the great deference which appears to be paid to such authorities. No less remarkable is the rapid falling off in this practice and practically complete cessation of it by the middle of the nineteenth century." Pound, *The Place of Judge Story in the Making of American Law* (1914) 48 *AM. L. REV.* 676, 684.

<sup>75</sup> THE MISCELLANEOUS WRITINGS OF JOSEPH STORY (1852) 198, 235; cf. *id.* at 405; KENT, 1 *op. cit. supra* note 4, at 481 ff. The extent to which Story, in his subsequent treatises, engaged in comparative study is indicated by his frequent reference, by way of illustration, to foreign works. As he indicated in the preface to the COMMENTARIES ON THE LAW OF BAILMENTS WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW, which originally appeared in 1832:

"My design in the present Commentaries has been to present a systematical view of the whole of the common law in relation to Bailments, and to illustrate it by, and throughout compare it with, the civil law, and the modern jurisprudence of some of the principal nations of continental Europe." (*Id.* at viii, 1840 ed.)

It is of some interest to note that this plan was adopted on the suggestion of Nathan Dane, who was so largely responsible for Story's various treatises on American law.

It may also be noted that in the COURSE OF LEGAL STUDY which the unfortunate David Hoffman published at Baltimore in 1817, specific provision was made in the tenth title for the study of the civil law, and in an extensive note as to the excellence of that law, it was concluded:

"In fine, no one aspiring to the character of lawyer or statesman, should calculate with any certainty on attaining distinction in either, without a competent knowledge of a system which forms a conspicuous feature in the codes of England, Germany, Italy, and Turkey; Scotland, France, Holland, Spain, and Portugal; and, without doubt, of most of the states in this western world." At 265.

In his review of this COURSE in an article published in the NORTH AMERICAN REVIEW in 1817, Judge Story, among other things, observed:

"What particularly pleases us is the enlarged and liberal view with which Mr. Hoffman recommends the student of the common law to a full and careful study of the Admiralty, Maritime, and Civil Law. If the note on the excellence of the civil law were not too long, we should gladly insert it in this place. We commend it, however, as well as his observations on the law of nations and the admiralty law, most earnestly, to all those who aspire to eminence as statesmen, or scholars, or lawyers." STORY, *id.* at 66, 90.

<sup>76</sup> Butler, *op. cit. supra* note 73, at 14. There is unfortunately no adequate account of this phase in the legal history of the United States. References to the views entertained as to the desirability of receiving the law of England in this country, which appear to have formed an aspect of the Federalist *vs.* Anti-federalist controversy, are to be found in 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL (1908) 193 ff. It is a matter of curious interest to note that, in this account, Warren describes the bitter feeling against England and English common law as an obstacle "to the study of law as a science."

Cf. also, Pound, *The Place of Judge Story in the Making of American Law*, *supra* note 10, at 676; Dale, *The Adoption of the Common Law by the American Colonies* (1882) 21 AM. L. REG. (N. S.) 553.

<sup>77</sup> The plan contemplated three professors of law, one of whom was to be of "the Roman Civil Law." REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921) 120.

<sup>78</sup> HOFFMAN, *op. cit. supra* note 75, at 250 ff. Cf. REED, *op. cit. supra* note 77, at 123 ff.

<sup>79</sup> *Id.* at 118, n. 3.

<sup>80</sup> Baldwin, *The Study of Roman Law in American Law Schools* (1911) 36 A. B. A. REP. 662, 665, and 3 AM. L. SCH. REV. 28.

<sup>81</sup> COHEN, *LAW AND THE SOCIAL ORDER* (1933) 238. The passage cited in the text is from Professor Cohen's answer to Yntema, *The Rational Basis of Legal Science* (1931) 31 *COLL. L. REV.* 925, which answer was originally published as *Philosophy and Legal Science* (1932) 32 *COLL. L. REV.* 1103, and is now embalmed in this volume of essays. The passage cited proceeds:

"It is not then accurate to say, as Professor Yntema does, that in the United States 'the university tradition in law was for a time partially interrupted.' It is only in our own day that it is beginning. Our universities are just beginning to annex the law schools and to make law teaching an independent profession, instead of a supplement to a busy lawyer's occupation." *Ibid.*

As I have not attempted to answer this vigorous *apologia pro domo sua*, chiefly on the ground that it constitutes an admission on the point principally involved—namely, whether or not Professor Cohen's previous charges that empirical, descriptive researches as to law must be nominalistic and anti-normative [*cf.* Cohen, *Justice Holmes and the Nature of Law* (1931) 31 *COLL. L. REV.* 352, 360 ff.] are well-founded and, if so, whether or not the scientific validity of such researches is thereby compromised—a few incidental suggestions may be permitted to ward off the possible inference that there is complete agreement.

The difference, it may be noted, is chiefly in emphasis and mode of statement; it recalls the situation of the three monkeys who reported their perceptions of the elephant. As my original statement suggests, it is agreed that there was something of an interruption of the university tradition in legal education in this country. The issue is how much, and to this the suggestions in the text above are relevant. It does not appear fair, in view of the contributions of such as Kent and Story who were stimulated in the production of the most significant legal works that have appeared in this country by their university connections, to dismiss the entire possibility of some connection between law school and university as phantasy.

The larger issue is as to the statement in my article that the study of law has "remained fundamentally scholastic, literary and speculative." Yntema, *supra* at 934. Professor Cohen affects to dismiss the suggestion that the tradition of the law has been literary and speculative as "mythical, at least as far as England and America is concerned." COHEN, *op. cit. supra*, at 237. This is a species of broadside, which it needs a book to answer, and, for this reason, the writer can only indicate his disagreement with this proposition, the generality of which is but an instance of the dangers involved in arriving at historical facts by intuitive, or in other words, "philosophical," methods. A few suggestions, however, may be permitted.

In the first place, it may be noted that the original question was as to the legal tradition in western Europe, which, leaving aside the situation in England, was formed chiefly by the university instruction in the civil and canon law, whereas the criticism narrows the issue down to the situation in England and the United States. In the second place, if this limitation be assumed, the fact cited by Cohen that, for a time, legal education in England was controlled by the Inns of Court does not demonstrate that it was without the scholastic traditions; the Inns were in effect colleges, and, as Holdsworth has remarked, the mode of education in the Inns "was not dissimilar to the analytical and dialectical methods of instruction pursued at the Universities." 2 *HOLDSWORTH, HISTORY OF ENGLISH LAW* (1923) 506. In the third place and on the contrary, it is probable that the narrowing of legal education was due, not to the earlier activities of the Inns, but to the

disappearance of the system of instruction inaugurated in the Inns in the middle of the seventeenth century, a circumstance which necessitated private study and fostered the apprenticeship system of legal training in the eighteenth and nineteenth centuries. "But we cannot doubt," states Holdsworth (*id.* at 6, 499), "that the average standard of the learning of the English lawyer in this period and the next would have been both higher and more liberal; we cannot doubt that the development of English law would have been freer and less technical; if the older system of legal education, instead of being destroyed, had been adapted to the needs of modern English law." In the fourth place, the criticism takes insufficient account of the university instruction in civil law, covering substantial fields of English law, and of the influence of Blackstone and other university professors of the common law. In the fifth place, the argument leaves out of account the social class from which the bar was recruited, their general education and interests, etc. The assertion that the English and American bar, at least so far as ideals and leadership are concerned, has been uncultured, without literary or speculative interests, is so unfair that it does not deserve refutation. Shades of Bacon and Selden, of Blackstone and Mansfield, not to mention Kent and Story, Haldane and Holmes!

Incidentally, the Inns of Court are not a particularly happy illustration of disinterest in literature on the part of the bar. Cf. GREEN, *THE INNS OF COURT AND EARLY ENGLISH DRAMA* (1931) 15 ff.; ODGERS, *SIX LECTURES ON THE INNS OF COURT AND OF CHANCERY* (1912) 220 ff.; DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* (1895) 59 ff.

In sum, the writer's initial suggestion was that the tradition of the law, once described by Serjeant Maynard as an *Ars bablativa* [cf. NORTH, *DISCOURSE OF THE STUDY OF THE LAWS* (1824) 29], had, through its affiliations with the university culture of the Middle Ages, acquired a scholastic, or, in other words, a literary and speculative cast, and that, as such, it has not tended to be receptive to the scientific movement. *Id.* at 934. Perhaps the most interesting analogy is to the development of medical science. Cf. Yntema, *supra* note 37, at 279, 293 ff. It is a matter of curious interest from a logical point of view to articulate the criticism of this suggestion, as advanced by Professor Cohen. The criticism involves the following propositional sequences: (1) the tradition of the law is technical and professional; *ergo*, it is not literary and speculative; (2) the tradition of the law, as expressed in Anglo-American legal education, has been largely without the universities; *ergo*, it is not literary and speculative; (3) the literary and speculative university tradition is concerned with the law as it ought to be, whereas the legal tradition professes exclusive interest in the law as it is; *ergo*, the legal tradition is not literary and speculative. It does not need refined analysis to indicate that there lurks in this argumentation—quite apart from the questions of fact—what one of my good friends has termed a deal of "shadow boxing." E.g., the first argument is tantamount to saying that, because an orange is small, it is not round; the second to asserting that, because the sea is made of water, there is none in the land; while the third argument goes on the gratuitous assumption that an abstract theory of legal ideals is incompatible with the profession of the bar's practical interest in the law as it is. But this ignores that such has been the precise logical position of the legal tradition and that the impetus of the nineteenth-century reform movement came from an intensely practical, utilitarian program, initiated in defiance of the theoretical conception of the common law as the perfection of reason.

Such are the extremities to which Professor Cohen is palpably driven to save his highly ambiguous "normative jurisprudence," if identified with the literary and speculative academic tradition, from the historically unavoidable imputation of opposition to reform. The fact is that the tradition of the law has been technical and professional; it has also

been literary and speculative; it has also been highly conservative. These characters are not incompatible. Their correlation is natural and highly significant.

<sup>82</sup> This practically, though not necessarily, tended to exclude the civil law. See, for instance, Story's remarks in his inaugural address as Dane Professor of Law at Harvard University, 1829, *The Value and Importance of Legal Studies*—

"When our ancestors emigrated to America, they brought this common law with them, as their birthright and inheritance; and they put into operation so much of it, as was applicable to their situation. It became the basis of the jurisprudence of all the English colonies; and, except so far as it has been abrogated or modified by our local legislation, it remains to this very hour the guide, the instructor, the protector, and the ornament of every state within this republic, whose territory lies within our boundaries settled by the treaty of peace of 1783. May it ever continue to flourish here; for it is the law of liberty, and the watchful and inflexible guardian of private property and public rights.

"It is of this common law, in its largest extent, that the Law Institution in this University proposes to expound the doctrines and diversities; and thus, to furnish the means of a better juridical education to those, who, as scholars and gentlemen, desire to learn its general principles." MISCELLANEOUS WRITINGS, *op. cit. supra* note 75, at 503, 506.

Cf. in this connection, Pound's illuminating article, *The Place of Judge Story in the Making of American Law*, *supra* note 10. The conclusion reached in this article is that the scholarly activity of Kent and, especially, of Story averted a possible reception of French law and, consequently, assured the reception of the English common law in an improved form adapted to American conditions. It should perhaps be added with respect to Story's contribution that, while he was the instrument, the plan was distinctively Nathan Dane's. The latter procured Story's rather reluctant appointment to the Dane professorate, created for the purpose, and appears to have laid out the direction of Story's scholarly activities. See, 1 WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* (1908) 412, where an account of Dane's significant influence upon the reorganization of the Harvard Law School in 1829 is given. Dane's general plan was to emphasize American law; this necessarily involved the subordination, on the one hand, of the local laws of the several states and, on the other, of foreign laws including the obsolete or inapplicable laws of England. In the introduction to his *GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW*, which is of peculiar importance as an indication of his views, Dane states:

"The author once thought, as he finds some now think, that in a work of the abridged and digest sort, of 5 or 6000 large pages, a great proportion of the local law and equity of every State in the Union, of English ancient law, and the Civil and other foreign laws, might be included; but experience and reflection are quite otherwise, and evince that these can occupy but a small space in a very large work, unless local, old, and foreign laws be made to exclude laws of general use and application. When we consider that the mere indexes only of the statutes, forms, and decisions, published in our twenty-four States, fill above 3000 pages, a lawyer can have reflected but little, who shall believe he can publish them to any valuable purpose in one half, or one third of that number of pages." 1 DANE, *ABRIDGMENT* (1823) xiv.

It has been noted in note 75, *supra*, that this conception did not preclude comparative study as an aid in the formulation of American law; indeed, Dane suggested to Story that, in his commentaries, he should incorporate references to the civil law materials. In the result, however, it did deflect Story's earlier belief in the value of civil law studies as a branch of legal education, and with it the curriculum which he developed, in a direction that left very little attention indeed to be given in the actual legal instruction to this subject matter. Referring to Story's curriculum, Reed states:

"In its curriculum the school projected more than it actually carried out. . . . What (Story) did do in his first curriculum, published in 1830, was to supplement the common-law and equity subjects, already taught by Stearns, by textbooks in Civil Law, International Law, Criminal Law, and Constitutional Law, including in the latter American state constitutions as well as the law of the federal constitution. In 1832, however, all these topics except the last (federal constitutional law) were dropped from the regular two-year course, now outlined as an alternative to the three-year course originally contemplated. Although until 1850 the additional subjects continued to be more or less vaguely offered as extra studies, for students who would consent to stay an additional year, the intensive work of the school was henceforth confined to its original narrow field, supplemented only by study of the federal constitution. Not merely state government but also statutory law was eliminated." REED, *op. cit. supra* note 77, at 146-147.

Reed adds:

"The Harvard curriculum, while keeping pace with the growth of American practitioners' law, and therefore vastly more crowded with common-law studies than the practitioners' schools which it replaced, has remained none the less crystallized within the original narrow circle of their aims. It has never so far completed the first portion of its task as to be able to attack the omitted portions. Whether by deliberate choice, or through necessity, or through apathy and neglect, thoroughness rather than breadth has remained Harvard's dominating ideal." *Id.* at 147.

<sup>83</sup> Cf. the tables in *id.* at 453, 454, and 456, which exhibit the parallelism between the Litchfield curriculum, the first Story-Greenleaf curriculum, Dwight's Columbia curriculum, and the later Harvard curriculum during the regime of Langdell.

<sup>84</sup> *The Civil Law* (1829) AM. J. 39, 61.

<sup>85</sup> For discussion of the conceptions underlying the development of the fourth-year graduate course at Harvard in 1911, see THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL (1918) 167 ff. Apparently, the dominant idea was to compromise between the desirability of retaining the established professional curriculum and the recognition of needed additional subjects through the institution of graduate instruction, which should, among other things, fertilize the everyday professional teaching. "Thus," it is remarked, *id.* at 169, "adequate provision will be made for jurisprudence, philosophy of law, comparative law, theory of legislation, administrative law, and criminology, without yielding to the fallacious notion that no one may be expected to know anything unless he has had a formal 'course' in it. Thus also more solidity will be given to the work of research and to graduate instruction. The one will grow naturally out of problems raised by study and teaching of the everyday law; the other will be given definiteness by the connection with concrete applications."

In other words, a policy of gradual infiltration by the superposition of a fourth graduate year upon the professional curriculum, rather than an expansion of the latter, was involved. From a practical point of view, there is, of course, much to be said for this Fabian policy; it is difficult to justify upsetting an appletart with a lot of marketable apples on it from that point of view. And, certainly, the program is a considerable acknowledgment of new needs and a distinct advance upon Langdell's conception of the scope of the functions of the law school. But the position, as a long-run policy, is liable to the following lines of criticism: (1) it apparently denies or at least postpones as long as possible the evil day for the availability of admittedly requisite subjects to the ordinary law student (the argument that knowledge can be gained without "formal" courses obviously undercuts the professional as well as the new subjects); (2) it assumes that the additional

subjects necessarily have to be abstract; (3) it is very questionable indeed, except in unusual cases, whether work in the additional subjects can be most effectively undertaken by the student in a fourth-year course without a previous foundation.

More significant, therefore, is the statement with reference to the graduate course in *id.* at page 171:

"While doing this work, however, there has been no disposition on the part of the School to depart from the policy of making professional training distinctly its main purpose. To keep up the graduate instruction the professors have added it to their regular teaching. Except the Carter Professorship of Jurisprudence there is no provision for it in the way of endowment, and from the beginning the occupant of that chair has done his full quota of the ordinary professional instruction."

It is not possible here to refer to subsequent efforts to expand the scope of legal studies in this country, notably at Columbia, Yale, Johns Hopkins, and a few other institutions. The study of the curriculum at Columbia is considered in Valeur's monograph, referred to *supra* note 55. The effort at Johns Hopkins had to be given up for financial reasons, and the achievements in other institutions that have made for definite advance in certain directions nevertheless can scarcely be said as yet to have challenged materially the basic vocational conception of legal education outlined in the foregoing quotations.

<sup>86</sup> See on this point, in addition to Munroe Smith's article on *Roman Law in American Law Schools* (1897) 45 AM. L. REV. AND REV. 175 ff., Dean Pound's more recent observation:

"As to graduate instruction, I doubt whether a course in comparative law as such is advisable. The teaching of jurisprudence is lame unless the students have a sound knowledge of Roman law and the civil law. Nor is there such a thing as teaching comparative law to those who lack this foundation. Indeed, teaching of Roman law in American law schools should be made an introduction to the civil law and modern codes and so an introduction to comparative law. Study of the common law followed by study of the civil law does not constitute study of comparative law. But study of the civil law in an American law school may be made a foundation in comparative law on which a graduate student, while pursuing his graduate study, or in his later years as a teacher, may go far. Beyond this, I should feel that comparative law is for the research workers; for the relatively few who are specially and immediately engaged in advancing knowledge." Pound, *The Place of Comparative Law in the American Law School Curriculum* (1934) 8 TULANE L. REV. 161, 168.

The chief distinction between Munroe Smith's suggestions and those of Dean Pound relates to the placement of Roman law—whether in the professional or the graduate curriculum; apart from this important point, they are in substantial agreement on the desirability of basing comparative studies upon preliminary training in Roman and civil law. Cf. *supra* note 85.

<sup>87</sup> Notice, for instance, the very interesting question of method involved in the two articles: Déak, *The Place of the "Case" in the Common and the Civil Law* (1934) 8 TULANE L. REV. 337, and Ireland, *The Use of Decisions by United States Students of Civil Law*, *id.* at 358.

<sup>88</sup> Cf. President Hutchins's very thoughtful address, *The Autobiography of an Ex-Law Student* (1933) PROCEEDINGS, ASSOCIATION OF AMERICAN LAW SCHOOLS 86, advocating the creation of departments of jurisprudence to supplement and eventually to react upon the professional instruction in the law schools, *id.* at 92.



## THE RIVALRY OF COMMON-LAW AND CIVIL LAW IDEAS IN THE AMERICAN COLONIES

MAX RADIN

BOTH Glanvil and Bracton knew that there was a difference between the laws of England and other laws. For one thing, there were the *leges Anglicanae* and the *leges Romanae*. Glanvil and Bracton felt it necessary to apologize for calling the English system law at all and their differing justifications are of the highest interest. They show the astonishing progress that the notion of political authority had made in two brief generations.<sup>1</sup>

Neither Glanvil nor Bracton, however, knew the term "common law" in our sense. But the idea of the "common law," that is, of a peculiarly English law, differing from the Roman law, the Church law, and the Continental forms of the feudal law, was already in existence.<sup>2</sup> It had, indeed, been in existence since the time of Henry I, two generations before Glanvil, and it is possible to say that the *Leges Henrici Primi* of about 1135 A.D. was more nearly the first book of the common law than Glanvil, although the *Leges Henrici* contain little and Glanvil a great deal of what later became unmistakably the "common law." Our "common law," the custom of the courts at Westminster—expanded later to include most, but never quite all, of the courts of England—was a real and distinguishable system in about 1300, or a little earlier, and the pretensions which it then made to equality with other systems were far in advance of those made for *leges Anglicanae* by Glanvil.

Still, there is no evidence of a real rivalry between the Roman law and the common law until the nationalistic movement in

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Church and State that characterized the latter part of the reign of Edward III. Wyclif gives it definite expression. In the fifteenth century, with Fortescue, the rivalry becomes open warfare. Indeed, under the Yorkists and the early Tudors the common law was in serious peril.<sup>3</sup>

That peril was over by the time of Elizabeth. Coke utters a triumphant and lusty cockcrow over a wholly defeated antagonist. But at that very time the common law was facing a renewal of the old warfare in a more insidious and dangerous form because of the rise of the notions of natural law. It was clothed in a garb that had so much in it of the Roman law that natural law and Roman law could almost be used interchangeably. Perhaps we might employ a common-law device and declare that a Romanistic doctrine raised a presumption that it was part of the law of nature, a presumption that laid on those who questioned it the burden of finding countervailing evidence.

What saved the common law was the fact that it had become the symbol of the liberty of Englishmen. It had done so, one might say, by repudiating its parentage. Coke repeated the fantasy—as old as Andrew Horn or older—that the common law was an Anglo-Saxon heritage which the Normans had sought to corrupt. The wickedness of the Normans and their feudal innovations was a constantly recurring theme in patriotic diatribes. The symbol of this Anglo-Saxon law was, ironically enough, that ultra-Norman and ultrafeudal code which we call *Magna Carta*.

Besides this symbolic character, the common law was inextricably bound up with the rights of landed proprietors, small and great, and it was the small landed proprietors who successfully maintained parliamentary government against prerogative and the Thorough. They did so, however, by reestablishing more firmly the alliance between the landowners and the merchants,

and ultimately the price to be paid for this alliance was the reception of the law merchant into the common law.

But the law merchant was based on natural law and reason and at the earliest beginning of the political conflict, well in the time of Elizabeth, it had become increasingly necessary to take this element into account. During the very height of the struggle between Crown and Parliament an organized body of natural-law doctrine appeared in the writings of Grotius and his followers. It was impossible not to have recourse to them, impossible not to compare the amorphous jumble of Coke's *Institutes of the Laws of England* with the specious logical clarity of the new learning, and quite impossible for most lawyers to derive as much satisfaction as Coke did from the difficulties which the acquisition of the common law presented to men who tried to learn it.

Between Coke and Blackstone, the works of Domat, Burlamaqui, and Pufendorf became thoroughly familiar to lawyers either in their original forms or in English translations. Rutherford made a British application of Grotius, and the accepted attitude toward the common law on the part of many leaders of the bar was that it was a national system to be cherished for its English character but needing very much the refining, pruning, and civilizing influence of the natural law in every respect except in the matter of political rights and powers. The common law, it may perhaps be said, partially acknowledged the superiority of the natural law, but had no intention of surrendering to it any more than was necessary. Apparently the common law did not recognize to any alarming extent the Romanistic wolf beneath the rationalistic sheep's clothing of its opponent.

It happened that the beginning of the natural-law movement in northern Europe and the time of the parliamentary struggle also coincided with the beginnings of American colonization. The question of what law was to prevail there was not an abso-

lutely new one in 1607, because attempts at colonization had been made before, and a great deal of land on the North American continent as well as many islands had been acquired. Persons had sailed to that land, entered upon it, stayed there for varying lengths of time. Evidently they could not have done so without some reflection on the laws that they were subject to, however fleeting and casual that reflection might have been. Property was acquired and blows were exchanged even during the brief occupancy involved in the attempts of Raleigh and others. There was perhaps no urgency in determining what law might be invoked, but it is hard to believe no one thought about it.

But when permanent colonies came into being—when Jamestown was founded in 1607, when the Massachusetts Bay Colony was established in 1630, when New Netherland was ceded in 1664—a great many persons thought about these things, and, very soon, the English courts thought about them.

The matter was at first dealt with on feudal principles and feudal analogies were at once called into play. There was abundant material. The essence of the common law was still the feudal bond which bound the lord to his man and which was essentially personal. Most of the mesne lords had disappeared, but there were still a great many left. It will be remembered that the most characteristic elements of the feudal tenures were not abolished till 1660. But while the bond between mesne lord and his man subsisted and still possessed considerable importance, the most important element in what was then regarded as the English constitution was the bond of allegiance between the king and his subjects, and the reciprocal duties and rights it created.

Of course, the personal relation was limited by space within its field of operations. But not altogether. The case of the postnati established—and it was sound feudal law to establish it—that a Scotsman born after 1603, while England and Scotland were

separate kingdoms but under the same king, was a subject not of James in his capacity as king of Scotland, but of King James, without qualification.<sup>4</sup>

Now James was "sovereign lord" not only in England and in Scotland, but also in Wales and in Ireland, in the Channel Islands, and in the Isle of Man. And he claimed to be equally sovereign in the new lands across the sea. The status of his subjects, whether they stayed in England or went across the seas, was never in doubt. It was always the same. They were bound by the bond of allegiance, the *ligeantia*; the word itself meaning bond. But that did not make clear what law they were to obey.

One sort of law they were certainly bound to respect. They were bound to obey whatever commands the king by right of his crown might lay upon them, directly or by deputy. In 1607 it was understood—not with absolute clearness, however—that many of the commands which could be laid by the king by right of his crown could be so laid only after having obtained the advice of the Lords and Commons in Parliament. The commands, of course, are our "statutes." Statutes are to the present day in England royal commands in form. At that time, they were, to a considerable extent, royal commands in fact, since the veto still subsisted.

How far the king might, in right of his crown, issue commands which did not need the advice and consent of Parliament, and which were binding on his subjects, was a much disputed question. No one doubted he might issue some commands. No one asserted—except a few absolutists—that he might issue any commands he pleased. But in 1607 as in 1185, when men said "the laws," they rarely meant commands whether parliamentary statutes or "proclamations," but they did mean bodies of legal customs which established rights of property and privileges in

regard to property, which determined family relationships, and which made certain acts wrongs to be punished and to be compensated for. What laws of this sort existed in the American Colonies?

We know the generally accepted view of nineteenth-century American cases. The colonists brought with them the English common law and they were bound by all the statutes that had been made before the colonization, as far as these statutes were applicable to the new surroundings, and by subsequent statutes when they were specifically made to include the Colonies. Often the application was implied. It was obvious that the king would not bid his subjects to do what it was practically impossible for them to perform. A similar qualification was usually attached to the applicability of the common law as well.

This question of practicality lies, I think, at the bottom of a much used phrase that has a distinct bearing on the history of American law, as all questions of procedure have. The phrase is: "where the king's writ does not run." The fact that the king's writ did not run across the sea is quite well established, and much was made of it at one time by a large group of colonial lawyers and statesmen. But the "king's writ" did not run in Wales either, or Ireland or the Isle of Man or the Channel Islands or Scotland. In the case of Wales and other places, the reason was an ancient liberty that it should not run. In the case of countries as remote as North America, the reason was a more homely and practical one. A writ, we may recall, is nothing more or less than a royal command, couched in the form of a letter to the sheriff or to a private person, commanding his appearance at the king's court in Westminster at a certain day. Evidently it was not rationally to be supposed that such a writ could issue out of the *officina brevium*, commanding the king's subjects in North America to

present themselves at Westminster, and certainly such commands could not very well issue *de cursu*, as a matter of routine administration of justice.

The point, of course, as Coke early pointed out, was that the statement was far too broad. What writs did not run? The ordinary writs of trespass and many others of the *Register* did not. But, to take Wales as an example, the king as sovereign lord had a feudal duty to correct errors and failures of justice and Coke made no doubt that such a writ of error ran. In general he distinguishes writs. Some are both mandatory and remedial and others mandatory but not remedial. The first class, he says, includes "writs of right, Formedon etc., of debt, trespass etc. and shortly all writs real and personal." These are "returnable or determinable in some court of justice within England, and to be served and executed by the sheriffs or other ministers of justice within England, and these cannot by any means extend into any other kingdom, country or nation, though that it be under the king's actual ligeance and obedience." The writs of the other sort, the purely mandatory kind, "are not tied to any place but follow subjection and ligeance in what country or nation soever the subject is." What those writs were is declared in *Calvin's Case*<sup>5</sup> in which several writs are cited from the *Register*. But these writs turn out to be merely general injunctions to protect the body and goods of the king's lieges and reform and redress the injuries they suffered.

The king's power to redress injuries involved the use of the writ of error, and in Vaughan<sup>6</sup> it is said that this is the only writ that in fact does lie beyond the seas.

But if the ordinary writs did not run, could there properly be said to be any common law? Any lawyer or property owner of the time might well doubt it. It is far more difficult than even juristic analysts realize to separate the legal means from the legal

result. For the ordinary person of the time it was almost insuperably difficult.

Still, in part, it had always been done. No one could help being aware that a man's rights in the law were not always justice in the moral sense. But all men would have been shocked—Coke most of all—by the statement that law had no relation to justice at all. And, consequently, the first question that in all probability would be asked in the formative part of the new settlements would not really be common-law questions in any sense. Common-law questions at that time seemed of necessity to take the form: "Will *quare clausum fregit* lie? Will *Accompte* lie? Will *assumpsit* lie?" To such questions, the answer must inevitably have been "No." But the questions whether or not a man had been wrongfully used and how he might obtain just compensation must have arisen almost at once when we recall the fact that there were some rather dubious characters in every colonizing group. And whether or not a man had been wronged and how his wrong was to be redressed were no more common-law questions than they were civil-law or canon-law questions. They were early called questions of "natural equity," and when "natural law" became a familiar term, they were quite clearly questions of natural law.

In *Calvin's Case*, Coke considered only two types of new countries: those conquered from a Christian prince' in which the king "may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain," and those conquered from infidels.

"But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and



in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity. . . .<sup>118</sup>

This doctrine is, of course, part of Coke's characteristic inhumanity and was too strong even for the most rugged of common-law lawyers. Coke asserted in the same case<sup>9</sup> that a pagan had no rights at the common law, which is declared to be an exploded error by the editor of Coke's *Reports*.

When it came to the law that was to be applied where the common law was not by itself applicable and where no regulation had been made, Coke would doubtless have used the common law rather than the Roman as a standard of natural equity. Later in this case<sup>10</sup> he objects to the claim that, where law and custom fail, reason is to be the guide. ". . . there is no such rule," he states, "in the common or civil law: but the true rule of the civil law is, *lex scripta si cesset, id custodiri oportet quod moribus et consuetudine inductum est, et si qua in re hoc defecerit, tunc id quod proximum et consequens ei est, et si id non appareat, tunc jus quo urbs Romana utitur, servari oportet*."

Evidently, he regards the common law as holding the same position for Englishmen everywhere as the law of the city of Rome did for Romans. The citation is from the *Digest*,<sup>11</sup> and is a fragment of Julian. We have, therefore, the paradox that to prove the supremacy of the common law as a model Coke can resort only to a passage in the *Digest* of Justinian.

But as a matter of fact, Coke neglected to take into account a third possibility; *i.e.*, that the country may have been uninhabited at the time of the occupation by English subjects. This is particularly set forth in the determination of the Privy Council of August 9, 1722.<sup>12</sup>

"Memorandum 9th of August 1722, it was said by the Master of the Rolls to have been determined by the Lords of the privy council, upon an appeal to the King in council from the foreign plantations,—

"1st, That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England; though, after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them; for which reason, it has been determined that the statute of frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of a land, does not bind Barbadoes: but that,

"2ndly, Where the King of England conquers a country, it is a different consideration: for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But,

"3dly, Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail. 2 Peere Williams, 75 & 76. *et vid. Collett v. Lord Keith*, 2 East 260. *Blankard v. Galdy*, 4 Mod. 225. S. C. 2 Salk. 411. *Attorney General v. Stewart*, 2 Meriv. 159."

It is this passage which is referred to in Blackstone's *Commentaries on the Laws of England*,<sup>13</sup> and there considerably qualified.

"... it hath been held, that if an uninhabited country be discovered and planted by *English* subjects, all the *English* laws then in being, which are the birthright of every subject,<sup>[14]</sup> are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the *English* law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance,

and of protection from personal injuries. . . . But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.<sup>[15]</sup> Our *American* plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of *England*, as such, has no allowance or authority there; they being no part of the mother-country, but distinct (though dependent) dominions. They are subject however to the control of the Parliament; though (like *Ireland*, *Man*, and the rest) not bound by any Acts of Parliament, unless particularly named."<sup>16</sup>

Two questions would then at once arise: first, whether the Colonies were conquered lands or previously uninhabited regions. The presence of the Indians was not conclusive since the uncertain character of Indian settlements and what seemed a lack of organization might well be taken to prove that the territories were essentially vacant. Secondly, if they were uninhabited, just how much of the English law was "applicable to their own situation and the condition of an infant colony." Blackstone, it appears, regarded the Colonies as conquered lands, doubtless from the Indians. New York and New Jersey certainly were—just as much as Jamaica and Grenada. And in *Smith v. Brown and Cooper*<sup>17</sup> Holt holds that Virginia also was conquered. "... The laws of England do not extend to Virginia, being a conquered country their law is what the King pleases." This law pleasing to the king is thereafter held to be contained in the "laws and statutes of Virginia," according to which the question at issue, the salability of a Negro, must be decided if the laws are properly proved.

On this point a great deal of confusion is found in the cases.

Usually it is maintained that a conquered country and a colony are irreconcilable designations, and that a colony implies that the country had been previously uninhabited. This is particularly discussed in *Campbell v. Hall*<sup>18</sup> before Lord Mansfield in 1774 just before the Revolution, and the difference is sharply supported in 1722 by Sir Philip Yorke (afterward Lord Hardwicke).

It was, therefore, by no means clear in the English courts whether or not any part of the common law was taken by Englishmen with them to the Colonies in North America. There are a number of statements that it was so taken, and that the Colonies were real colonies or plantations; that is, groups of Englishmen settled by royal order or permission in previously uninhabited lands. Apparently this was not the case if the lands were conquered, and on this point there was some dispute in the case of colonies like Virginia, New England, and the Carolinas, which had not been conquered by formal warfare with an organized power. In conquered countries, apparently, laws could be established by the Crown, and these laws need have no reference to the common law at all.

The question was complicated by the existence of charters and proprietary feudal grants in which the right to make "laws" was specifically granted. There was commonly a qualification that these laws were not to be contrary to the laws of England. We must not take the term "laws" too solemnly.<sup>19</sup> The term "statutes" was used of guilds, and "laws" of the bylaws of municipal corporations. Indeed, the qualification that these "bylaws" were not to run counter to the laws of England was a familiar and somewhat formal phrase.

Just when was a law "contrary to the laws of England"?<sup>20</sup> This was extremely doubtful even when it was admitted that the "common law" was carried over. As we have seen, the ordinary writs, "mandatory and remedial," did not run, and that meant

that most of the common law equally did not apply. It seems to have meant that certain general principles of the common law were to be considered as subsisting. Property was to receive protection and was to be heritable. Perhaps we may go so far as to say that the distinction between real property and chattels was to be maintained, a distinction, we may remember, important chiefly in cases of intestacy. Most of the other doctrines which the English cases take to be an essential part of the common law, and, therefore, transferred to the Colonies, are nothing more than general doctrines of right, "natural equity," and could be regarded as civil-law doctrines as well as common-law."

The English legal theory, therefore, knew of a transplanting of the common law under any circumstances only in an extremely limited form. And where the common law was not taken over even in this form, either because of chartered liberties or of specific grants or because the new land was conquered territory, there was little basis for the doctrine of Coke that the common law was the necessary model to be employed for the new law to be established—a doctrine which, we may recall, he unblushingly lifted from the Roman law.

In such cases, the law of the new land, it was said, depended on the "king's pleasure." But that expression did not mean an arbitrary caprice. It was the king in his corporate, not his personal, capacity whose pleasure was involved, and there was the immediate controversy about the limits of the prerogative, that is, the extent to which the king might give valid commands without the advice and consent of the Lords and Commons, and, whether with or without that consent, there was the troublesome matter of the limitations imposed by reason and equity.

We may recall that in the seventeenth century the modern doctrine of the omniscience of the king in Parliament was unknown except as a philosophic speculation. Scarcely any one,

and certainly no lawyer, common, civil, or canon, would have questioned the dictum of *Bonham's Case*, implied also in *Calvin's Case*, that no act of Parliament contrary to religion or reason was valid. Not only that, but there does not seem to have been any presumption that such enactments were rational, although, for customary law, *moribus ac consuetudine inductum*, the mere weight of ancient tradition created such a presumption.

It was quite true that Coke thought that only trained lawyers were competent to apply such a rational check, but this certainly was not generally accepted, and in any case, it was a dangerous opening. Even lawyers were likely to be allured by the attraction of a system that declared itself animated only by reason and justice. Indeed, if the common-law lawyers had dared to use the power which Coke was jealously intent on imposing on them alone, the common law might in the century between 1660 and 1760 have lost most of the characteristics that made it what it was.

As far as the colonists themselves were concerned, their attitude was as confused as that of the English courts. In the New England colonies there was notoriously no intention at first of permitting the common law to govern, even if the Crown had sought to force it on them. Their charters usually provided for the making of their own laws. The usual qualification that nothing was to be done which was contradictory to English laws was not a serious matter. The New England colonies based their laws on the Bible, and it would have been nothing short of effrontery to assert that the Biblical laws were contrary to those of England. In any case, the requirement that the laws were not to be contradictory meant merely that there was to be no palpable contradiction. Evidently a statute legalizing polygamy, abolishing inheritance, establishing communism—no one of these things was unthinkable or was without adherents at the time—would be void. But certainly it was not supposed that the whole common-

law system of landholding would have to be instituted, or the entire English organization of courts. That is to say, a system that was to all intents and purposes based on Romanist or canonist principles would not necessarily have been impossible under the charters and patents to corporations and individuals, and, certainly not, one that was based on natural law.

As a matter of fact, the doctrine widely current among the most extreme supporters of colonial rights was really self-contradictory. The extreme theory was that the Colonies were complete, although dependent, states, the citizens of which were subjects of the British Crown. For this, they had no need to resort to modern theories of protectorates or mandates. There were the standing examples of Scotland, Ireland, and Wales, to which could be added the Isle of Man, also formally a kingdom and granted as such to the Stanley family, the Earls of Derby.

If, however, the Colonies were states under the sovereignty of the English Crown, there was no reason why the common law, any more than the civil law or any other system, should prevail there. The common law was the custom of the Courts of Exchequer, of Common Pleas, and of King's Bench, whose process did not of itself run in the Colonies at all. And it had relatively recently become the "custom of England" in the medieval sense in which customs had territorial and local foundations. But it was emphatically not the custom of Scotland, of Ireland, of Wales, of Man, or of the Channel Islands, and there was no sense in which it could possibly be the custom of New England, New York, or Virginia.

None the less, the same persons whose claim to the largest conceivable autonomy under the Crown was so insistent often urged with equal vehemence that the common law was their heritage. Quite obviously the common law in this sense was purely a symbol. They meant the common law as it had been used in the parliamentary struggle, the doctrine of limitation of the preroga-

tive, the demand for a great many of the rights included in the Grand Remonstrance and later in the Bill of Rights. The most definite and precise of these rights were trial by jury and freedom from arbitrary search and seizure. These two rules, highly important as they were, were far indeed from constituting any considerable portion of the common law, as it was normally understood by most persons, but they permitted the use of the term as a rhetorical weapon in the heated discussion of colonial rights.

As a symbol of the rights of Englishmen, the common law would have served the colonists very imperfectly. The common law emphasized the rights of Parliament and the colonists were more incensed at acts of Parliament which oppressed and exploited them than they were at royal proclamations that did so. The right of representation, even if it had been granted on the same terms as it was in England, would have been worse than useless. Only the smallest fraction of Englishmen had the parliamentary franchise; most Americans would not have come within that class and they would probably have outdone their English associates in complete devotion to English as against colonial interests.

The discussion between Franklin and Governor Pownall of Massachusetts at the end of the Colonial period is quite illuminating. Governor Pownall asserted (1769) that the colonists, being Englishmen, carried "with them the laws of the land" and that, "therefore, the common law of England . . . is . . . at all times the law of those colonies and plantations." Franklin's answer is a categorical denial. "They carried with them," he declares, "a right to such parts of laws of the land, as they should judge advantageous; . . . a right to make such others as they should think necessary, not infringing the general rights of Englishmen." As for the common law, it is law in the Colonies only "so far as they have adopted it; by express laws or by practice."<sup>22</sup>

The English view as expressed by Pownall is quite clear. It is



considerably more drastic than that set forth by Blackstone. And Franklin's attitude, shared as we know by a great many Americans, assumed what would now be called a dominion status for the Colonies—indeed, the word dominion is freely used in this connection. He unqualifiedly denies the power of Parliament and declares that the charters were an indissoluble contract between the king—not the king in Parliament—and the Colonies, and could be altered only by mutual consent.<sup>23</sup>

The political nature of the controversy need not engage our attention here. It is worth-while noting, however, that even the spokesman for English sovereignty is fairly vague in what he assumes to be the actual effect of the transfer of the common law to the Colonies, and thinks of that term rather as a symbol of "English sovereignty," that is, of the authority of the English Parliament, than as a body of specific rules.

As to what the colonial lawyers thought of their law, we have a number of direct statements. Mr. Warren, in his *History of the American Bar*,<sup>24</sup> has described from the original sources what the education of a colonial lawyer consisted of in the eighteenth century. Undoubtedly books on the common law were preponderant. But the striking thing was the wide use of books on the civil law and on natural law.<sup>25</sup> In all the statements that have been published from the lawyers of this period, there is none that describes the common law as the exclusive basis of American law. It furnished them with most of their legal vocabulary. It gave them many procedural devices. But even the way these devices were used was quite different from the methods in vogue in England. It is remarked that actions on the case are used to recover land, that equity and ecclesiastical cases are tried before juries; and these facts alone make clear the character of the common law in the minds of the lawyers of the eighteenth century. It was the most accessible repository of legal methods—most accessible be-

cause it was in English. But it was at no time the sole repository.

Much is made of the fact that in the discussion of law up to the appearance of Blackstone frequent reference is made to *Coke upon Littleton*. That reference is a little misleading. Toward the end of the Colonial period the best lawyers of the country admitted that, although they had been brought up to believe that *Coke upon Littleton* was indispensable, the book was in fact far too difficult for beginners.<sup>26</sup> We may be sure that what John Adams found too difficult was at least equally so for his contemporaries.<sup>27</sup>

And, indeed, while *Coke upon Littleton* is occasionally cited by courts, it can hardly be said that the law contained in the *Tenures* was to any real extent the law of the American Colonies. A few examples of estates-tail and of other specialized forms of tenure could be found, but the overwhelming mass of land was held in what might or might not be called fee-simple, but was undoubtedly felt by the colonists to be as full and complete a dominion as they had over any type of chattel. Jefferson was quite right in saying that it was definitely allodial in character, not feudal at all, and consequently not a common-law tenure.<sup>28</sup>

In such a form of landownership, the natural law and Romanistic notion of *dominium* was quite clearly more influential than the common-law notion of "holding land from some overlord." And with the idea of *dominium* lawyers were thoroughly familiar, since they read Grotius, Pufendorf, Burlamaqui, Wood's *Institutes of the Civil Law*, as well as his *Institutes of the Common Law*, and Selden and Spelman quite as much as Coke.

Perhaps an incident in Massachusetts legal history may make the situation clear. On November 11, 1647, the general court ordered the importation of two copies of each of the following: *Coke upon Littleton*, *Coke's Reports*, *New Terms of the Law*, the *Book of Entries*, *Coke on Magna Charta*, Dalton's *Justice of*

*the Peace.*<sup>29</sup> Whether or not they were actually obtained we do not know. It is, of course, highly likely that they were. But the purpose of ordering them is the following: "to the end that we may have better light for making and proceeding about laws."

If there is anything certain it is that in 1647 Massachusetts was not being governed in accordance with the common law and that it had no intention of being so governed.<sup>30</sup> The use of these books, therefore, was subsidiary and supplementary. The common law was a system to be examined for guidance but it certainly did not control.

Again, in 1650, the same General Court notes the need of regulating maritime affairs:

"And for as much as there are already many good laws made and published by our own land and the French nation and other kingdoms and commonwealths . . . the said laws printed and published in a book called *Lex Mercatoria* shall be perused and duly considered, and such of them as are approved by this court shall be declared and published to be in force in this jurisdiction."<sup>31</sup>

We have no record that any part of Gerard Malynes's *Consuetudo vel Lex Mercatoria* was actually "published and declared" as in force in Massachusetts, but it is noteworthy that this book, a private treatise, is described as a book of "laws" quite as much as any definite report of English cases and any list of English statutes. The nature of the *Lex Mercatoria* need not be insisted on. Its professed basis was natural law and reason, and natural law and reason speak in the Romanistic terms in the pages of Malynes's book, if anywhere.

What may be gathered from the general attitude of the Colonies is that the public controversy about the law in force in America was concerned chiefly with the power of Parliament to invade what was regarded as the fundamental rights of the col-

onists. The guaranty of these rights was frequently found in a vague reference to the "common law," but its general repudiation as a complete system left this form of justification somewhat dubious. It was safer to take the right of the king's subjects, as based on "natural equity," on a fundamental and immutable right established by the *ligeantia* and, thus traceable by no very long pedigree, to that "written reason," *ratio scripta*, which was one of the ways of describing the Roman law.

As a particular example of this, we may call attention to the famous phrase that an "Englishman's house is his castle." The use of the term "Englishman" itself seems to mark this as an ancient Anglo-Saxon or at any rate long-established English privilege and to distinguish Englishmen from the wretched subjects of Continental tyrants, who must submit to arbitrary searches and seizures by their despotic masters. The maxim is the basis of the great case of *Entick v. Carrington*<sup>32</sup> in which a complete presentation of fundamental rights is given. The violation of the right of domestic security by the "writs of assistance" constituted a major grievance of the American colonists. The right was later incorporated in the Fifth Amendment as one of the most important of constitutional guaranties. In *Boyd v. The United States*,<sup>33</sup> the history of the doctrine is set forth and much is said of its fundamental character.

"It [search and seizure] is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty."

Now, the famous phrase "an Englishman's house is his castle" is cited from Coke, but it does not occur in 4 Institutes 177, which is frequently given as its source. This passage deals with the occasions in which a house may be broken into by writ, and they are

extensive enough to make the privilege, as far as it was based on common-law doctrines, of little protection to the person. To these limitations I shall recur, but for the present it will be well to look at the phrase itself.

In *Semayne's Case*,<sup>34</sup> this statement is made: "... the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." And later in this case<sup>35</sup> it is said "their houses (which are their castles)." Then again in 3 Institutes 162 the phrase recurs with the authority for it. "For his house is his castle, *et domus sua unicuique tutissimum refugium*." This phrase with its Latin authentication is repeated in *Bowles's Case*.<sup>36</sup>

This Latin phrase, the only one Coke cites as authority, is taken almost verbatim from the *Digest*,<sup>37</sup> "*quia domus tutissimum cuique refugium atque receptaculum sit*." The passage is from Gaius's *Commentaries on the Twelve Tables*, a fact worth remembering. Gaius makes the point that by the weight of authority<sup>38</sup> a man may not even be formally summoned to law from within his house (*in ius vocari*), since refusal to obey such a summons justified body arrest. However, it is provided that a simple *denuntiatio*, an official notification from the magistrate, may be made at his home, "*verecunde autem praetorem denuntiari debere, non extrahi de domo sua*."<sup>39</sup> Such a *denuntiatio* would not necessarily lead to an arrest. There were, none the less, occasions in which a summons might be issued at a man's house, but it is expressly provided that the person summoned might not be forcibly dragged out of the house—"de domo sua nemo extrahi debet,"<sup>40</sup> a phrase which is given as a general rule in the book of the *Digest* called *De diversis regulis iuris antiqui*,<sup>41</sup> which was the fertile source of so many maxims of both English and Continental law.

These phrases were fairly old when the lawyers took them up.

Both are contained in a famous passage of Cicero:<sup>42</sup> "*Quid est sanctius, quid omni religione munitius quam domus uniuscuiusque civium? . . . hoc perfugium est ita sanctum omnibus ut inde abripi neminem fas est.*"<sup>43</sup>

As far as English law is concerned, the phrase "a man's house is his castle" is not found first in Coke. It occurs in Staunford's *Pleas of the Crown*<sup>44</sup> in Law French, "*ma meson est a moy come mon castel hors de quel le ley ne moy arcta a fuer,*"<sup>45</sup> "My house is like a castle to me from which the law does not compel me to flee." And, again, in Lambarde's *Eirenarcha*,<sup>46</sup> "homicide in his own defense,"<sup>47</sup> "*ita fugias ne praeter casam,* as the Comicke said: and our Law calleth a mans house his castel, meaning that he may defend himselfe therein." That is to say, although Lambarde says "our Law" he cites as authority only the Roman poet Terence—the *Comicke*<sup>48</sup>—and the passage implies the *perfugium* of Cicero, the place to which a man may flee in extremity and be perfectly safe.

That this idea of the inviolability of a house was quite general can be shown by the contemporary evidence of John Manningham, a London barrister, whose *Diary*, published in 1603, contains this entry under February 20, 1601. "Yf a man in the Lowe Countryes come to challenge a man out of his house, and because he comes not forth throwes stones at his windowes, this [is] a crime capitall, because an assault in [on?] his house, which is his castle."<sup>49</sup> In this English lawyer's mind, accordingly, the fact that a man's house is his castle is far from being a privilege of Englishmen. Indeed, it had apparently been a German proverb. "*Das Haus ist des Bürgers Feste.*"<sup>50</sup>

It is an idea that doubtless goes back, as Cicero's words indicate, to a very ancient concept of the house and its walls as in themselves sacred. The word is *sanctus*, the word used of the walls and gates of a city,<sup>51</sup> and, as we have seen, it is taken to be

a complete protection. Not even a magisterial order can drag a man out of this refuge. The house seems to have all the characteristics of the Greek asylum, an institution that was fully adopted in Roman law.

And such an asylum, we may remember, the Englishman's house in no way was. Coke, Lambarde, and Dalton, in all the discussion of this matter, emphasize the fact that the house itself is not inviolable. If the door is on the latch, a bailiff armed with civil process may enter. And above all, whenever the king has an interest—as in all felonies—the house may be broken into.<sup>52</sup> Indeed, even the protection against breaking for civil process was commonly disregarded in spite of Coke.

Accordingly, the resplendent rhetoric of Pitt's *Speech on the Excise Bill*—so often cited—needs much more than qualification: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storms may enter, the rain may enter—but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement."<sup>53</sup> This is excellent histrionics, but as a statement of the common law it loses sight of the fact that the king of England was just the person who at any time or season in the pursuance of his interest might lawfully enter, not merely if the tenement was ruined, but if he had to batter down the wall to get in. In fact, the word "castle" to some extent implies the king's right. Every castle, it was often said, was the king's castle.

It is likely that Pitt's oratory, rather than Coke, has interpolated the word "Englishman" into the phrase on which I have dwelt so long. There is nothing to indicate that in the seventeenth century either Englishmen or Americans thought of the inviolability of a house as a matter of common law rather than as a fundamental right common to all mankind. And since Coke quoted the *Di-*

*gest*, and most educated men read Cicero, it is quite likely indeed that most persons were fully aware that this natural right had been, as was usual, best expressed in the Roman law.

The point has been labored so much because it is significant. Protection against searches and seizures loomed extremely large to the colonists up to the very moment of the Revolution. And of the groups of legal ideas in which that concept could be framed, it was the Romanistic natural law rather than the common law which provided the best historical and logical setting.

The study of American legal history is only beginning. Many important records of the Colonial and early post-Revolutionary period are still unpublished. But what is already available should be enough to compel a revision of the ideas that have too readily become current. The common law in the period between 1660 and 1776 certainly made great strides toward the domination of the law of America. But it never quite achieved it. Throughout the Colonial period it remained a subsidiary, supplementary law, rivaling and in many specific matters ousting local institutions, and regarded sometimes with veneration and at others with suspicion and hostility.

In the same way, the natural law, whether its Romanistic form was recognized or not, was also widely accepted as a subsidiary and supplemental system. It provided few specific institutions, but it did provide some, and local methods were often enough justified by the authority of natural-law doctrines.

The law which these two systems were deemed to supplement was the new and indigenous law—or rather thirteen bodies of new law—created *pro re nata* by the activities of magistrates, the determination of legislative and quasi-legislative bodies, and—in the opinion of many persons both in England and America—the determination of the Crown, with and without the sanction of Parliament. Here, also, as has been said, the natural-law doctrine



of the inherent limitations of governmental authority played some part. And the "laws" of legislative bodies were not essentially different in idea or in terminology from the "ordinances" and "bylaws" of corporations. But what is quite clear is that in each of the diverse units in North America a new law was everywhere being consciously formed.

A real "reception" of the common law in the United States took place in the nineteenth century, in a way that showed many parallels to the "reception" of the Roman law in medieval and Renaissance Europe. During the Colonial period, the common law had a rival it never displaced even for the purposes of supplementing and directing the systems growing in the thirteen different jurisdictions. If the Revolution had not occurred, the common law might have triumphed several generations sooner than it did. As things were, the Revolution created a strong anti-English reaction. The implications of this fact need much more careful study than they have so far received.

## NOTES

<sup>1</sup> Glanvil, Pr. (Woodbine ed.) 24, says: "*Leges namque Anglicanas licet non scriptas leges appellari non videatur absurdum, cum hoc ipsum lex sit, quod principi placet legis habet vigorem.*" The statement in Bracton is [Intr. f. 1a (Woodbine ed.) II, 19]: "*Sed absurdum non erit leges Anglicanas (licet non scriptas) leges appellare, cum legis vigorem habeat quicquid de consilio et de consensu magnatum et rei publicae communi sponcione, auctoritate regis sive principis praecedente iuste fuerit definitum et approbatum.*" Both Glanvil and Bracton were royal officials but the imperial claims of Henry II could not be raised by his grandson. For one thing, Magna Carta had intervened. However minor may be the importance of that document as a charter of personal liberties, there is no doubt of its fundamental importance as a charter of the privileges of the magnates.

<sup>2</sup> For the use of the phrase common law, cf. POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) i, 176-178. Reference may here be made to Radin, *Glanvil on the Common Law* (1932) 82 U. OF PA. L. REV. 26-36.

<sup>3</sup> The influence of the Roman law on the English law and the rivalry of the two systems in England is beyond the limits of the present discussion.

<sup>4</sup> Calvin's Case, 7 Coke 3-48, 77 Eng. Rep. 377-411 (1609).

<sup>5</sup> *Id.* at 8b, 77 Eng. Rep. at 386.

<sup>6</sup> VAUGHAN, REPORTS (1677) 402.

<sup>7</sup> Calvin's Case, 7 Coke 17b, 77 Eng. Rep. 398 (1609).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Id.* at 19a, 77 Eng. Rep. at 400.

<sup>11</sup> D. 1, 3, 32, pr.

<sup>12</sup> Reported in 2 P. Wms. 75, 24 Eng. Rep. 646 (1722).

<sup>13</sup> 1 BLACKSTONE, COMMENTARIES \*107.

<sup>14</sup> 2 P. Wms. 75, 24 Eng. Rep. 646 (1722).

<sup>15</sup> Citing 7 Rep. 17. Calvin's Case. Shower, Cases in Parl. c. 31.

<sup>16</sup> It would be of interest to examine in detail the actual reception of Blackstone by the colonists. The much quoted statement of Burke about the number of copies sold must not be given too much significance. There were a great many highly conservative lawyers in the Colonies who would have completely agreed with his presentation of the relations of the Colonies to England. Jefferson's extreme dislike of Blackstone may have been shared by most of the supporters of colonial rights and was probably based on the passage quoted in the text as much as on any disapproval of his statements about the law in general. On one point he agreed with Blackstone. The common law was not, as such, the law of the Colonies. But the authority of the English Parliament was a burning issue.

<sup>17</sup> 2 Salk. 666, 91 Eng. Rep. 566 (1707).

<sup>18</sup> 1 Cowp. 204, 98 Eng. Rep. 1045 (1774).

<sup>19</sup> In the resolution of April 30, 1629, in which the organization of the Colony of Massachusetts Bay is authorized, it is declared that the governors may "make ordeyne and establish all manner of wholesome and resonable orders, lawes, statuts, ordinances, directions and instructyons not contrary to the laws of the realme of England." There was nothing specific or sacrosanct about the term "laws."

<sup>20</sup> The point was especially made by the Privy Council and the attorney general in 1667. Reinsch, *The English Common Law in the Early American Colonies*, 1 ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 383, citing 3 PALFREY, HISTORY OF NEW ENGLAND (1866) 309. It will be found, however, when the specific issues are examined, that the objection to the laws of Massachusetts was based on the fact that members of the Established Church were disqualified as full citizens in the Colony. There was no objection made to the wide discrepancy between the procedural, property, and family law of Massachusetts and of England.

<sup>21</sup> The term "natural equity" is a mere Anglicization of *naturalis aequitas*, a phrase frequently repeated in the Roman texts. Cf. INST. 2, 1, 39-40; D. 2, 14, 1, pr.; 12, 4, 3, 7; 13, 5, 1, pr.; 38, 8, 2, and many other passages. It was a hackneyed expression of the civilians.

<sup>22</sup> 4 FRANKLIN, WORKS (Bigelow ed. 1887) 300-301. This is taken from the "State of the Constitution of the Colonies," published in 1769. Franklin's comments were communicated directly to Pownall.

<sup>23</sup> *Id.* at 309-317, 325. ["The charters are sacred. Violate them, and then the present bond of union (the kingly power over us) will be broken."]

<sup>24</sup> C. 8, 157-187.

<sup>25</sup> The library of Prince (*id.* at 162, n. 4) contained five books on the common law and five on the canon and civil law. Cf. also Smith's advice to John Jay in 1760 (*id.* at 170) in which the study of the law of nature, of nations, and the civil law is recommended as earnestly as is the study of the common law.

<sup>26</sup> *Id.* at 176, citing Daniel Webster's AUTOBIOGRAPHY (1829).

<sup>27</sup> Diary of John Adams (1788) 16 PROC. OF THE MASS. HIST. SOC. (2d ser. 1902) cited in WARREN, HISTORY OF THE AMERICAN BAR (1911) 177.

<sup>28</sup> Jefferson, RIGHTS OF BRITISH AMERICA (Writings, Ford ed. 1892-1899) i, 443; ii, 78-79.

<sup>29</sup> 3 RECORDS OF MASSACHUSETTS BAY (Shurtleff ed. 1854) 193.

<sup>30</sup> *Cf.* the resolution of May 25, 1636 (1 *id.* at 175). The laws are to be merely "agreeable to the word of God. Where there is no law, then as neere the law of God as they can."

<sup>31</sup> 3 *id.* at 252.

<sup>32</sup> (1765) 19 HOWELLS, STATE TRIALS, at 1030. It is in this case that we first find a specific statement of the legend that the abuses of the Star Chamber were due to the un-English secrecy of its proceedings. I have discussed this point in *The Right to a Public Trial* (1932) 6 TEMPLE L. Q. 381-398.

<sup>33</sup> 116 U. S. 616, 631, 6 Sup. Ct. 524, 532 (1886).

<sup>34</sup> 5 Coke 91b, 77 Eng. Rep. 195 (1605).

<sup>35</sup> *Id.* at 92b, 77 Eng. Rep. at 98.

<sup>36</sup> 11 Coke 82a, 77 Eng. Rep. 1257 (1616). *Cf.* also Bettisworth's Case, 2 Coke 32a (1591).

<sup>37</sup> D. 2, 4, 18.

<sup>38</sup> Gaius's words are *quidam putaverunt* but the inclusion of the fragment in the Digest indicates the acceptance by Justinian of the doctrine.

<sup>39</sup> D. 39, 2, 4, 5, Ulpian on the Edict, citing Pomponius.

<sup>40</sup> D. 2, 4, 21, Paul on the Edict.

<sup>41</sup> D. 50, 17, 103.

<sup>42</sup> *De domo sua*, §109.

<sup>43</sup> It is quoted in 4 BLACKSTONE, COMMENTARIES, B. IV, c. 16, § 258.

<sup>44</sup> Plees del Coron, 14b (1557).

<sup>45</sup> This has been astoundingly mistranslated. It sometimes appears as: "My house is to me as a castle since the law has not the art to destroy it."

<sup>46</sup> First published in 1574.

<sup>47</sup> (1614 ed.) 254, Bii, 7, *sub verbo*.

<sup>48</sup> The passage is Phormio, 786. It is there stated as a proverb, *quod aiunt*, which indicates that in Terence's time (about 150 B. C.) it was already old. Lambard takes it in the first sense—much the most likely one—of the three suggested by Donatus, a fourth-century commentator, *Ne praetermittas casam tuam quae sit tibi tutissimum receptaculum*. Donatus is probably quoting Gaius. *Cf.* the grammarian Pompeius in 5 GRAM. LAT. 311, 35. Terence was known to every educated man of the time.

<sup>49</sup> CAMDEN SOCIETY PUBLICATIONS, No. 99 (1868) 21. The reference is clearly to the ancient Germanic custom of *Ausheischen*. *Cf.* FEHR, DER ZWEIKAMPF (1908) 25-26.

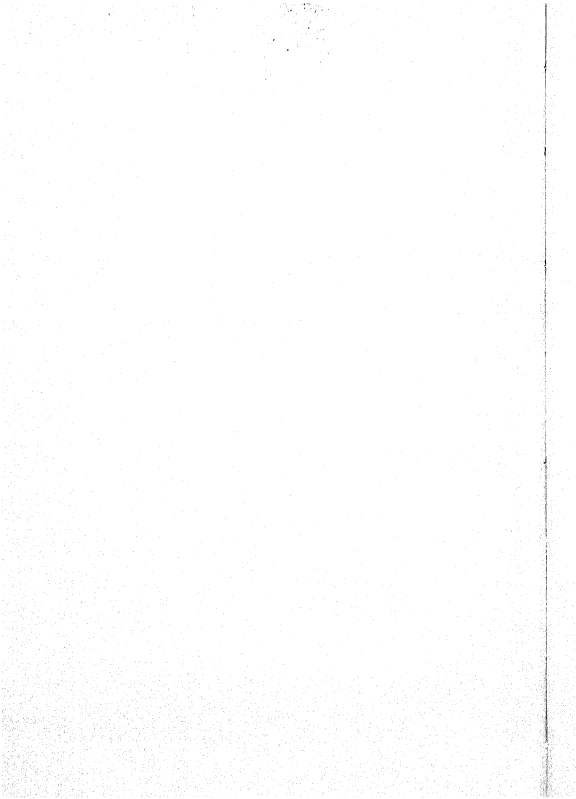
<sup>50</sup> 2 WANDER, DEUTSCHES SPRICHWÖRTER LEXIKON (1870) 398. Wander refers to the collection by Graf (*id.* at 497, 82) as his authority. This was not available to me. *Cf.* Usenbruggen, ed., *Der Hausfrieden* (1857), pp. 3-4. The phrase occurs in the statutes of the city of Hainburg, on the Danube. 10 ARCHIV F. OST. GESCHICHTSQUELLEN 142.

<sup>51</sup> Just. Inst. 2, 1, 10; Gaius 2, 8.

<sup>52</sup> The reason specifically assigned by the older writers—not by Blackstone (IV, 16, § 258)—is that the king's interest is paramount. Indeed, the right to break the door in

pursuit of a felon is justified only by the king's property right in the felon's goods, and not by considerations of the public's safety. In this connection Dalton's statement is of the highest importance. DALTON, *JUSTICE OF THE PEACE* (1618) 127. "Lastly, upon all cases where the king is party, or hath interest in the business, the officers may break open the doors, as aforesaid; for *no man's house shall be a castle against the king.*" This statement should be kept in mind in connection with the famous speech of Pitt, quoted in the next paragraph of this paper. It will be remembered that this book of Dalton was one of the books ordered for use by the General Court of Massachusetts.

<sup>53</sup> Speech on the Excise Bill. The entire speech was not available to me. It became known throughout the world. The passage is translated in Straffordello's collection 1 *LA SAPIENZA DEL MONDO* (1883) 279. It was paraphrased in the United States Senate on May 10, 1880, by Senator John J. Ingalls in the following immortal form: "I think some orator once said that though the winds of Heaven might whistle around an Englishman's cottage, the king of England could not."



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